48294

HARRIOT W. ELDRED, Appellee,	)	
v.	)	APPEAL FROM
FRANKIE I. WILLIAMSON, et al., Defendants	)	SUPERIOR COURT
	)	COOK COUNTY.
On Appeal of FRANKIE I. WILLIAMSON, Appellant.	)	

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This is an appeal taken from a decree entered in the Superior Court of Cook County foreclosing a mortgage. It is the theory of the defendant that the mortgage in question and the notes which it secured were tainted with usury, inasmuch as C. W. Ward had made the loan and had retained the sum of $795 as commission over and above the legal rate of interest, and that there is evidence in the record substantiating that claim.

The original mortgage notes and trust deed had been executed by Harry Randall and Clara B. Randall, his wife, on August 6, 1928. At the time the Randalls owed certain sums of money to various creditors. They made out and delivered to C. W. Ward notes in the sum of $13,250 secured by a trust deed. The understanding between Ward and the Randalls was that Ward was to use this money to pay the various creditors of the Randalls. One of the claims which Ward had agreed to pay was a first mortgage for the payment of which the Randalls became liable when they purchased the property. The mortgage and notes, originally dated July 18, 1921, were payable on or before July 18, 1926. On May 6, 1926 an extension agreement

was entered into extending to July 31, 1931 payment of the principal sum. This extension agreement apparently was made at the time when the Randalls purchased the property. At the time of the extension agreement there was $6,500 due on the mortgage, which was held by Cooper Kanaley and Company (hereafter referred to as Cooper). Both the Randalls and C. W. Ward were deceased at the time the foreclosure action was commenced. At the time of the death of Ward the Cooper mortgage had not been paid. The plaintiff, Harriot W. Eldred, is the daughter of Ward. The Randalls left as their sole heirs at law Frankie I. Williamson and Lucille Trammelle, sisters, who were made defendants. Lucille Trammelle died before the decree was entered, leaving as her only heir at law Frankie I. Williamson. This appeal is taken by Frankie I. Williamson, hereafter referred to as the defendant.

A second mortgage was also on the same property with Fidelity Trust and Savings Bank for a face amount of $7,125, a junior mortgage with H. J. Coleman and Company for a face amount of $1,650, and a mechanic's lien of the Traders Investment Company in the sum of $250.

The plaintiff in her original complaint filed July 20, 1948 sought to foreclose the Randalls' trust deed securing the original notes for $13,250. The defendants answered the complaint, setting up a defense of payment, and alleging that the contract between the Randalls and Ward was usurious, that under the statute all interest was forfeit, and that if a computation was made the results would show that the defendants owed nothing to the plaintiff. The

defendants also set up as a defense the 10-year statute of limitations.

The plaintiff filed a reply denying the allegations concerning usury, and setting up that if there was a usurious contract it was made by the original maker of the loan and not by her, and also alleging that the running of the statute of limitations was tolled because the plaintiff after default entered into possession of the property with the consent and agreement of the Randalls. The plaintiff filed an amended reply in which she sets up that she had inherited the principal notes and trust deed in question as the sole heir and legatee of her father, Ward, who was the owner and holder of the said notes and deed, and she alleges that she is a holder in due course of the principal notes without notice. She also alleges that Ward from the proceeds of the loan was to pay the principal and interest on the Cooper mortgage in the principal sum of $5,500; that Ward paid the interest and principal on the due dates and after his death the plaintiff from her own funds paid the interest and principal on the said mortgage; that since the Randalls had agreed to the plaintiff's taking possession of the property the plaintiff had withheld foreclosure proceedings; and that the Randalls had waived the defense of usury.

The cause was thereupon referred to a master in chancery and hearings were commenced on July 6, 1949. In 1951 the plaintiff filed a second amended reply, again denying the allegations of usury and realleging that if there was any usury in the contract it was made by the lender before the plaintiff became the owner and holder of the notes and trust

deed and that the running of the statute of limitations was tolled. In that reply the plaintiff also alleges that she inherited the notes and trust deeds from her deceased father, Ward; that she had no knowledge of the usurious agreement; and that she is a holder in due course of the notes. She also states that she had made various reductions in the amount of interest. She denies that any commissions for the making of the loan were paid to Ward. The plaintiff further alleges with reference to the Cooper notes that all of the payments on the said notes were made by Ward during his lifetime and after his death by the plaintiff, and that the trust deed has not been released of record and the plaintiff claims all of the rights, remedies and privileges under the said trust deed and notes which she purchased from Cooper without any knowledge of any infirmity or taint of usury in the same. She again denies that commissions in the sum of $795 were retained by Ward. She again sets up that the running of the statute of limitations was tolled. In this reply she makes the allegation that she inherited the notes and trust deed from her father and in the alternative that her father in her early minority acted as her agent in the investment for her of large sums of money; that if the plaintiff did not inherit the said notes and trust deed they were hers by purchase; and that in any case she had no knowledge there was any taint of usury on the indebtedness.

Later, on August 16, 1957, over the objection of the defendants, the plaintiff filed an amended complaint, which we will discuss later on. The defendants moved to strike the amended complaint, and the court overruled their motion.

The following issues appear to have been raised by the pleadings:

(1) (a) Was there a usurious agreement?

(b) If there was such an agreement, was the defendant barred from raising it because the plaintiff is a holder in due course of the notes without knowledge of infirmity and the defendant is estopped because of representations or conduct of the mortgagors?

(2) Was the running of the statute of limitations tolled by the fact that the mortgagee took possession of the premises with the consent of the mortgagors?

(3) Was the plaintiff a purchaser for value of the Cooper notes and a holder in due course, and does the plaintiff have a right to foreclose that mortgage?

The trial court overruled all the exceptions filed by the defendant and the substance of its decree was in accord with the master's report.

In the decree the court found, among other things, that on August 6, 1928 the Randalls, being indebted in the sum of $13,250, executed certain notes payable to bearer; that the notes were secured by a trust deed dated August 6, 1928, executed by the Randalls, covering certain described real estate (the real estate in question here); that there was an agreement in the trust deed that in case of default in payment of any of the notes the principal sum at the option of the holder should become due and payable with immediate right of foreclosure and that the court upon the filing of such suit could appoint a receiver for the property; that certain notes were in default and on February 24, 1936, when the plaintiff took possession of the premises, there was due on the August 6th notes the sum of $10,655 in principal and $1,965.81 in interest, making a total of $12,620.81; that that sum was reduced by payments from the rents collected less expenses, so that at the time

of the filing of the complaint the sum due was $8,557.47. The court further finds that the plaintiff has a first, prior and paramount lien upon the said premises which, together with master's and attorney's fees, amounts to the sum of $16,749.84. The court further finds that while the defendants in their answer have alleged an unlawful usurious agreement between the parties, the defendants have "failed to sustain the burden of proof" placed upon them by their allegations pertaining to usury, and that there is no evidence of usury. The court further finds that the statute of limitations did not run against the plaintiff because of the fact that the plaintiff entered into possession of the premises after default. The court orders the payment of the said sum together with provisions for sale in case of failure to make such payment. In the decree the court further finds that "* * * one of the considerations received by Harry Randall and Clara B. Randall at the time of their making of the mortgage notes, dated August 16, 1926 [sic] in the principal sum of $13,250 was the undertaking and promise of the mortgagee to pay to Cooper-Kanaley & Co. the principal and interest after July 18, 1928, on a first mortgage then existing in the sum of $5,500.00 as and when it became due * * *," and that the plaintiff did pay certain sums to Cooper as interest payments; that on July 17, 1931 the principal note of $4,500 became due and "* * * upon the payment of said principal note No. 5 and interest coupons Nos. 9 and 10 hereinabove set forth, Harriot W. Eldred became vested with and was the owner of all of the rights, liens, privileges of said principal note and the Trust Deed that secured said note. That no part of said principal sum of

$4,500.00 has been paid. * * * That the plaintiff was a bonified [sic] purchaser for value of said first mortgage evidenced by principal note No. 5 in the amount of $4,500 * * * for value, in due course, without any notice of any infirmity or claim thereof * * *"; that the said note was in default at the time when the premises were surrendered to the plaintiff; and that the assignment of rents applied equally to that mortgage.

The master's findings are substantially the same. In the master's report the master also finds that the defendants have failed to prove the allegations in their answer pertaining to usury and that the transactions failed to show any evidence of usury.

The defendant before us argues (a) that the mortgage upon which the action was based, that is, the mortgage securing the notes executed by the Randalls on August 6, 1928 in the sum of $13,250, was tainted with usury, and (b) that the statute of limitations had run against that mortgage.

As a preliminary matter we are confronted with the question as to whether or not these questions were properly raised by exceptions in the trial court. It has long been the established rule that where no objections or exceptions are filed to the master's report the findings of fact are conclusive as against a party who has the right but does not object in apt time to the master's report. Postel v. Hagist, 251 Ill. App. 454; Haring v. Godbersen, 13 Ill. App.2d 95, 141 N.E.2d 90; Barney v. Comrs.of Lincoln Park, 203 Ill. 397, 403, 67 N.E. 801, 803; Singer, Nimick & Co. v. Steele, 125 Ill. 426, 429, 17 N.E. 751, 752. In the latter case the court says:

> "The practice is, where a party is dissatisfied with the finding of the master in chancery, he shall make distinct exceptions, so the court can readily understand what matters are at issue between the parties, otherwise it will be understood he acquiesces in the conclusions and findings of the master."

In the case before us the defendant did file objections to the master's report, which objections were permitted to stand as exceptions and were overruled by the court. The objections appearing in the abstract were couched in the most general form. There was no specific objection made either to the finding of the master that the defendant had failed to prove that the transaction was usurious, or that the master was in error in finding that the statute of limitations had been tolled by the plaintiff's taking possession of the property after default. In the objections filed it is stated "that defendant reiterates, realleges, incorporates and makes a part of these objections the Brief on the part of defendant heretofore filed with the Master in January 1959, and the Abstract of Evidence and conclusions on behalf of defendant heretofore filed with the Master." Neither the brief nor the abstract of evidence above referred to appears in the record before us. Since in the abstract of the record filed in this court it does not appear that objections were made or argued before the trial court with reference to the alleged error of the master in finding that the statute of limitations was tolled, that objection has been waived. However, with reference to the question raised concerning usury we find the following order entered by the trial court on July 11, 1960: "* * * It is further ordered that the Motion of defendant to vacate the decree of June 7, 1960 is allowed to consider the exceptions

of the defendant to the Master's Report. The court having heard the defendant, overrules the exception that the defence of usury should be sustained." The court at that time reduced the rate of interest found by the master and overruled all other exceptions.

The life of the law is reason. The rule that a reviewing court cannot permit nor consider matters raised for the first time before it is in the furtherance of an orderly procedure. The party dissatisfied with the conclusions of the master cannot stand idly by and first raise those matters before a reviewing court. On the other hand there is no requirement that the exceptions be specifically set out in any particular form. The only question that the reviewing court has to determine is, Were these matters properly before the trial court and did that court act upon them? In Haring v. Godbersen, supra, cited by the plaintiff in her brief, the court further says: "Nor can we find from the abstract of the record where the contentions here urged were even informally raised or argued before the chancellor."

We must assume that an experienced trial court in entering the order referred to must have been satisfied that the same objections were properly made and argued before the master. Even if they had not been, in Barney v. Comrs. of Lincoln Park, supra, at 403-4, the court says:

> "The general rule is, that where no objections are filed to the master's report the findings of fact of the master are conclusive. (Cheltenham Improvement Co. v. Whitehead, 128 Ill. 279; Gehrke v. Gehrke, 190 id. 166.) We are of the opinion, however, when exceptions are filed in court to the master's report, both as to questions of fact and conclusions of law, and they are heard by the chancellor and sustained, the attention of the chancellor not having been called to the fact that no objections were made to the report before the master,

> that the fact that no objections were made to the report before the master will be deemed to have been waived, and that the question of the lack of such objections cannot be raised in this court for the first time. Had that question been raised in apt time in the court below, the case could have been re-referred and the defect in the record cured. An objection that can be cured must be made in the lower court in apt time, otherwise it will be deemed to have been waived, (National Bank of Lawrence County v. LeMoyne, 127 Ill. 253,) as the rule is of general application that where a party fails to object in apt time but acquiesces in his adversary's mode of conducting a case, he will not be permitted to make an objection for the first time in this court which he failed to make at the proper time below. Kankakee and Illinois River Railroad Co. v. Chester, 62 Ill. 235."

In our opinion the contention of the defendant that the contract was usurious is properly before us for our consideration.

If the notes and the mortgage were tainted with usury, section 6 of chapter 74, Illinois Revised Statutes, is applicable, and that section provides that where a contract provides for interest or compensation at a higher rate than seven per cent only the principal sum due thereon can be recovered. In I. C. Bank & Trust Co. v. Geary, 274 Ill. App. 327, the court discusses the statute and the cases decided thereunder and lays down the rule that while usurious interest voluntarily paid cannot be recovered back, nevertheless so long as any part of the debt remains unpaid the debtor may insist upon a deduction therefrom of all usurious interest paid.

The defendant relies upon a letter written to Harry Randall on August 20, 1928 by Ward, in which letter Ward sets out a statement of the Randall account, and among other items stated therein is the item "To commission $795." The letter further specifically sets out various other payments made by Ward in accordance with his agreement with the Randalls. It is

the contention of the defendant that the $795 was retained by Ward as a commission for making the loan in addition to the legal seven per cent interest rate.

In 35 I. L. P. Usury, sec. 5, it is stated:

> "A transaction is tainted with usury where, in addition to the interest, if any, stipulated in a contract of loan or forbearance, the creditor exacts of the debtor, as a condition of the loan or forbearance, or for making it, an additional sum, or the transfer of property, whether designated as a bonus, or a commission, or by another name, unless the sum so exacted, or the value of such property, when added to the stipulated interest, if any, does not exceed interest at the maximum lawful rate on the principal sum of the loan or debt."

See Sanford v. Kane, 133 Ill. 199, 205-6, 24 N.E. 414, 415.

The plaintiff contends that even though it could be held that the statement in the account, unexplained, would indicate that the sum of $795 was retained by Ward as commission, there is no showing in the record that Ward loaned his own money to the Randalls, and she asserts that the contract is not tainted with usury if the responsibility for the payment of the commission cannot be charged to the person making the loan. The only assumption which can be drawn from the original pleadings of the plaintiff is that the loan was made by Ward himself. After the defense of usury was brought into the case by the answer of the defendants, the plaintiff then through various amendments to the complaint raises a variety of defenses endeavoring to meet the allegation that the transaction was tainted with usury--among others, that the charges made at the time the loan was negotiated were for actual money which had been expended by the lender in paying the Randalls' debts in accordance with his

agreement. That defense was not substantiated by any evidence brought before the master. The plaintiff has alleged more than once that she inherited the notes and trust deeds as the heir and legatee of her deceased father, Ward, without knowledge that any usurious agreement had been made, and she again alleges that her father in her early minority acted as her agent in the investment of large sums of her separate money, and that she had no knowledge that there was any taint of usury on the mortgage indebtedness but that she is without any knowledge as to whether she inherited the notes and trust deeds or whether they were owned by her and purchased for her account at the time of the making thereof. Again, with reference to this defense, there is no evidence appearing in the record.

The plaintiff endeavored to have introduced certain exhibits, among others, a record designated as Ward's loan record. This exhibit was subsequently ruled inadmissible by the court. At that time the plaintiff stated that the record was her "father's loan record of his loan and the payments that were received on it." Plaintiff's evidence was not stricken and remains in the record.

We hold that while the burden of proving a usurious transaction rests upon the party asserting such a transaction, when that party—in this case the defendant—has satisfied the original burden of proof by showing the retention of $795 as commissions by Ward, the plaintiff then has the burden of going forward with evidence to substantiate her allegations that the original money used in the making of the loan was her money and that Ward was only acting as a broker and that she had

no knowledge of any retention of commissions. No such evidence on behalf of plaintiff appears in the record, and the purport of the record, as we read it, is that it was Ward's money which was used in the original loan made to the Randalls. The mere fact that Ward had acted as plaintiff's agent, without any further showing, would not relieve her of liability. The court erred in following the master's finding that the record fails to show any evidence of usury.

The most extraordinary phenomenon appearing in the case is the interjection of the Cooper mortgage into the pleadings, the findings and the decree. At the time the $13,250 loan was made Cooper held a first mortgage on the Randall property. By the agreement between the Randalls and Ward the principal and interest on that mortgage were to be paid by Ward out of the $13,250 loan. Under the agreement made by the Randalls with Ward, Ward was not to turn over to them any of the money loaned but was to use it in paying various debts which had been incurred by the Randalls, and in the letter written by Ward to Randall on August 20, 1928 Ward makes the statement that he had tried to pay the principal on the Cooper mortgage but that Cooper would not accept it until the date when it was due under an extension agreement previously entered into between the Randalls and Cooper. Ward stated in the letter, however, that he would continue to pay the interest and at the time the principal note was due he would pay that.

After the defendant had filed an answer to the complaint setting up the defense of usury, the plaintiff filed an amended reply in which she states that Ward "from the proceeds

of the loan was to pay Cooper Kanaley & Company principal and interest on a first mortgage then existing on said property in the sum of $5500.00 as and when it became due"; that Ward did pay the interest; and that after his death the plaintiff from her own funds paid the principal and interest. Plaintiff then filed a second amended reply in which she again states that Ward from the proceeds of the loan was to pay Cooper the principal and interest on the mortgage after July 18, 1929 as and when it became due; that the plaintiff from her own funds paid the principal and interest on the said mortgage after the death of her father, Ward; that the sum of $5,518.88 which was reserved out of the proceeds of the note was paid to Cooper on the first mortgage; and that the payments were made by Ward during his lifetime and after his death by the plaintiff. The plaintiff admits that said trust deed had not been released of record, and the plaintiff says that she "claims all of the rights, and remedies, and privileges that there may be under said Trust Deed and note securing the same, which were by her purchased from said Cooper, Kanaley & Company, without knowledge of any infirmity or claim of any infirmity or tainted usury * * *." The plaintiff also states that the said first mortgage was outstanding and a lien upon the property.

The hearing before the master commenced on June 6, 1949, and on August 16, 1957 the plaintiff filed an amendment to her complaint, in which, after realleging the material matters in the original complaint, she states in addition that she does not know whether she inherited the $13,250 notes and trust deed or whether they were owned by her or purchased for

her account at the time of the making, and in the alternative she alleges that on January 8, 1931 she paid to Cooper the interest and principal due on the first mortgage held by Cooper and that at the time she did not intend that either the notes or trust deed should be released or discharged until the principal debt of the makers shall have been fully and completely discharged, and that she became vested with and owned all of the rights etc. of the trust deed. She prayed that judgment be entered against the defendants on the said mortgage and that an account may be taken and the defendants be directed to pay the amount found due, and in case of failure to pay, that the property be sold.

The filing of this amendment to the complaint was objected to, among other grounds, on the ground that it attempted to set up a new and different cause of action in the same count in violation of the Practice Act. The various objections made to it were overruled by the court.

The trial court in its decree finds that "one of the considerations received by Harry Randall and Clara B. Randall at the time of their making of the mortgage notes, dated August 16, 1926, in the principal sum of $13,250.00 was the undertaking and promise of the mortgagee to pay to Cooper-Kanaley & Co. the principal and interest after July 18, 1928, on a first mortgage then existing in the sum of $5,500.00 as and when it became due, which undertaking was performed * * *"; that the plaintiff paid to Cooper the following sums, to-wit, two interest notes in the sum of $292.50, together with the principal note due July 18, 1931 in the sum of $4,500, all

of which notes were secured by the Cooper trust deed. The court further finds that upon the payment of the said principal and interest notes on the Cooper mortgage the plaintiff became vested with, and the owner of, all of the rights, liens and privileges of the said principal note and trust deed that secured said note, and "that no part of said principal sum of $4,500.00 has been paid"; that the plaintiff was a bona fide purchaser for value of that mortgage together with the two interest coupons in due course without notice of any infirmity or claim thereof. The court further finds that the first mortgage in the principal sum of $4,500 and interest thereon has not been paid; that "it was not merged or extinguished, and has not been released. It is a good and subsisting first lien." The court then enters into a computation of the amount which it finds was due the plaintiff under the foreclosure proceedings on the $13,250 mortgage, and finds that at the time when the Randalls gave to the plaintiff an assignment of rents on February 24, 1936 there was due on the principal $10,655, computing the notes which were paid prior to that time in the amount of $2,595, together totaling $13,250. In other words, the court in its computation finds that the entire sum of $13,250 was an obligation entered into between the Randalls and Ward. From the evidence in the record it is apparent that that sum must necessarily include the money paid for principal and interest on the Cooper mortgage. None of the money loaned at any time came directly into the hands of the mortgagor. In its decree the court further states, in a paragraph following the computation, that "Harriot W. Eldred was, at the time of the

filing of the Complaint and Amendments herein, and is now the legal owner and holder of the principal notes and Trust Deed securing the same, and by reason of being such owner and holder, and by reason of the aforesaid defaults, such owner and holder is entitled to foreclose the lien of said Trust Deed." The court further finds that the plaintiff has a first, prior and paramount lien upon the premises, apparently under the $13,250 mortgage.

The Chicago Title and Trust Company was made a party defendant in the case by the amendment to the complaint asking for an accounting under the Cooper mortgage. The court in its decree enters a default against the Chicago Title and Trust Company as trustee under that mortgage, as well as under the $13,250 mortgage.

The decree is not particularly lucid nor comprehensible, and the master's report is even less so. It is clearly evident from the decree, however, that the court is authorizing the foreclosure of the $13,250 mortgage and no other mortgage whatsoever. The decree is contradictory inasmuch as it says that one of the considerations received by the Randalls was the undertaking of Ward to pay the Cooper mortgage, and that the "undertaking was performed." The decree also, again referring to the Cooper mortgage, states that "no part of said principal sum of $4,500 has been paid." The plaintiff, apparently seeking any shelter from the accusation of usury, interjects the theory that she was a purchaser in due course of the Cooper mortgage, which theory the trial court also adopts. If she was a purchaser in due course of that mortgage, then the contract between Ward

and the Randalls was violated inasmuch as Ward did not fulfill his obligation to pay the notes secured by the Cooper mortgage and to have the same released. It is apparent that the theory advanced by the plaintiff is an afterthought inasmuch as the Cooper mortgage appears in the record with a perforated "PAID" mark on it, as do the notes upon which the plaintiff relies. The plaintiff puts no evidence in the record in support of her contention. The court should have stricken the amendment to the complaint bringing into the picture the Cooper mortgage.

The plaintiff has repeatedly pleaded that she inherited the $13,250 notes and mortgage and that consequently she was a holder in due course. That is not the law. Ward was not a holder in due course of the notes, and by inheritance the plaintiff was placed in no better position than that of Ward. She also pleads in the alternative that her own money was used by Ward in making the mortgage and that she had no knowledge of the retention of any commission by him. If she inherited the notes and mortgage as she has pleaded, then her own money was not used by Ward in making the mortgage. It is necessary that the plaintiff adopt one theory or the other. It is true that the inventory of Ward's estate appearing in the record does not show the $13,250 notes and mortgage as part of the estate. The plaintiff could have testified that she did not inherit the notes and mortgage and could have explained how and when she acquired the same. There is no such evidence in the record.

The plaintiff alleges that the defendant was estopped from raising the defense of usury because of the fact that there was an agreement between the Randalls and the plaintiff

to take possession of the mortgaged premises, and in support of that contention cites the case of Aldrich v. Aldrich, 260 Ill. App. 333. That case did not involve a foreclosure. It was based on a contract, and the court held that the assignment of that contract constituted a novation and that while in the opinion of the court no usury was involved, nevertheless because of the novation the defendant was estopped to advance the defense of usury. The facts in that case are entirely different from the case at bar. The plaintiff also in her brief agrees that in order to raise an estoppel the plaintiff must be a bona fide holder, and in support of that contention cites the case of Marks v. Pope, 289 Ill. App. 558, 7 N.E.2d 481, which case lays down the rule that before a party can be estopped to raise the defense of usury the party now attempting to enforce the obligation must have been a purchaser in due course and there must have been conduct or representations made upon which the doctrine of estoppel in pais might have been invoked. This case was reversed in Marks v. Pope, 370 Ill. 597, 19 N.E.2d 616, but the dicta relied on by the plaintiff represents a sound view of the law. In the Marks case the court says that under the Illinois statute no agreement can be made by the parties to waive usury and that the doctrine of estoppel in pais is based on principles of morality and good faith. The plaintiff here is not a purchaser in good faith nor a holder in due course either of the original $13,250 mortgage or of the Cooper mortgage. The plaintiff misapprehends the law in Illinois with reference to a holder in due course. The fact that a party is a purchaser in good faith, standing alone, does not prevent raising a defense of usury. In Hirsh v. Arnold, 318 Ill. 28, 148 N.E. 882, the

court discusses this question and states: "* * * a purchaser of a mortgage or trust deed takes it subject to all the infirmities to which it is liable in the hands of the mortgagee, and in equity the mortgagor is entitled to every defense against the assignee which he could have made against the original mortgagee. (Olds v. Cummings, 31 Ill. 188; Schultz v. Sroelowitz, 191 id. 249; Pittsburgh Plate Glass Co. v. Kransz, 291 id. 84.) The defense of usury in a foreclosure suit is just as effectual against an innocent purchaser before maturity as it is against the original mortgagee." In Marks v. Pope, 370 Ill. 597, the question was raised with reference to whether or notthe rule first laid down in Olds v. Cummings would apply where a trust deed secured a bond issue, and in that case the court, after discussing Olds v. Cummings, points out that the doctrine of Olds v. Cummings has no application to deeds of trust given to secure railroad coupon bonds intended to be thrown upon the market and circulated as commercial paper and to be used as securities for permanent investments. Neither of the cases overrules the Olds case, and Professor Trumbull, in an article entitled "The Proposed Uniform Commercial Code and Investment Securities in Illinois," 51 Northwestern L. Rev. 424, at 427, says:

> "Illinois appears never completely to have abandoned the minority rule that a bona fide purchaser before maturity of a negotiable note secured by a mortgage has the rights of a holder in due course in a suit on the note, but takes the mortgage subject to some, at least, of the defenses available against the original mortgagee. By a gradual process of qualification and distinction, however, this doctrine has ceased to have any application to investment securities issued in series secured by a trust indenture."

The author cites the cases of Olds v. Cummings, supra, and Marks v. Pope, 370 Ill. 597.

In support of her contention the plaintiff cites 35 I. L. P. Usury, sec. 31, p. 445, which makes too broad a statement, relying on Eltonhead v. Found, 153 Ill. App. 191. That case did not involve a suit brought to foreclose a mortgage. It was a bill in chancery to enjoin the defendant from collecting a note in the hands of a bona fide holder, and the court holds that such action would not lie. That case is not applicable to the case before us.

The evidence is sufficient to support the defense of usury. Neither the master's findings nor the decree should have made any findings concerning the Cooper notes and mortgage except that they were paid under and by virtue of the agreement between Ward and the Randalls and that the plaintiff was derelict in her duty in not having that trust deed released of record.

The decree of the Superior Court of Cook County is reversed and the cause is remanded with directions to the court to compute the interest payments made on the $13,250 mortgage and then determine the amount now due on that mortgage, if any, in accordance with the provisions of section 6 of chapter 74, Illinois Revised Statutes, and in accordance with the views expressed in this opinion, and to enter a decree accordingly.

Reversed and remanded with directions.

Dempsey and Schwartz, JJ., concur.

Abstract only.

48269

CHARLOTTE COLE and DAVID JOHNSON, Administrator of the Estate of EMMANEAL COLE JOHNSON, Deceased,	)	APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY.
Plaintiffs-Appellants,	)	
v.	)	
CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, a corporation,	)	
Defendant-Appellee.	)	

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

A verdict of not guilty was returned in this consolidated personal injury and wrongful death suit which charged the defendant with negligently maintaining a multiple-track grade crossing and operating a train. The plaintiffs assert that the verdict was contrary to the manifest weight of the evidence and complain about the admission of improper evidence, the rejection of proper evidence and the giving of erroneous instructions.

The accident occurred just before 6 p.m., November 22, 1955, at the intersection of the defendant's north and south tracks and 35th Street, an east and west street, in the Village of Steger, Illinois. An automobile driven westward across the tracks by Herbert Cole collided with the engine of a southbound train. In the front seat with Cole were his wife, the plaintiff Charlotte Cole, his two-year old child and his sister, Emmaneal Cole Johnson. Charlotte Cole was the sole survivor. Her coplaintiff is David Johnson, administrator of the estate of his deceased wife, Emmaneal.

Cole had come from Mississippi two months before

the accident, found employment, and his wife and children followed him a month later. They lived in Broadview, a community west of Steger and west of the defendant's tracks. After returning home from work on November 22nd Cole, who had bought the car just two weeks before, drove his wife and his sister to the store. Upon completing their shopping in stores east of the tracks, they put their groceries on the back seat of the car and got in the front. Mrs. Cole sat in the middle with her child on her lap. Mrs. Johnson was next to the right window. The front windows, which had steamed up earlier, were down a few inches. The headlights were on, the heater was working and the windshield wipers were operating, for it was dark, cold and drizzling.

Their car was going 15 to 20 miles per hour westward on 35th street and was following the tail-lights of another auto less than a half-block ahead. They were conversing. Suddenly the interior of their car was brightly illuminated. Mrs. Cole looked to her right up the track and saw the light on the engine. A second later the car was crushed by the 57-mile per hour passenger train. Cole, Mrs. Johnson and the baby were killed. Mrs. Cole regained consciousness three weeks later in a hospital.

Mrs. Cole testified she heard neither whistle nor bell. A pedestrian, who was walking his dog to the west of the tracks, said he heard none just before the collision. He saw the oscillating light on the engine and the head-lights of three autos. He said one eastbound auto had

just cleared the tracks; another, going west, was just doing so as the third car [the Coles'] approached the tracks. Then the train flashed by.

The engineer saw but one car, the Coles', when the train was about 250 feet north of the crossing. He first noticed its headlights reflected in the railroad signs on both sides of the tracks. Then he saw the lights themselves. He lost sight of the car as the train got closer to the crossing, for he was on the opposite side of the engine. The fireman, who was seated on the east side of the engine, first saw the headlights one-half block, or about 360 feet away, and then saw the car. He said it did not speed up, slow down, swerve or stop. The engineer and the fireman said the train's headlights and oscillating light were on; that the horn was sounding and the bell was ringing and had been almost continuously as they went through Steger. An employee of the railroad and the wife of an employee, who were riding on the train, corroborated them, and a passenger said the whistle was blowing at the time of the emergency stop. Three residents of the neighborhood testified they heard the whistle preceding a sound which they soon learned was the collision.

There were no gates at the crossing. There was but one railroad warning sign east of the tracks on 35th Street. This was on the north side of the street, between the sidewalk and the street, 12 feet from the first track and 25 feet from the second or southbound tracks upon which the train was running. It was a non-lighted, non-flashing

cross-buck, 10 feet in height, with the words, "Railroad Crossing - 4 Tracks." There was one street light near the crossing; it was on the south side of 35th Street 47-1/2 feet east of the sign. It was on an arm which extended over and 24-1/2 feet above the street. How much light it gave and whether it illuminated the sign and the tracks was disputed, as was the degree to which an auto's headlights would light the sign.

Also in dispute was the visibility at the time of the accident and whether the view to the north was obstructed. There was a dirt road parallel to and 23 feet east of the tracks. A car was parked in this road north of the 35th Street sidewalk. It belonged to an occupant of the first house which was 90 feet east of the first track and 50 feet north of the street. Four trees, which were about 17 feet apart, were in front of this house and 4 trees and some bushes were to its west along the roadway. The tracks and 35th Street were on the same level but both were a foot or two lower than the sidewalks or the embankments along their sides. The plaintiffs contend that the depth of the street and tracks, the trees and bushes, house and parked car, interfered with the driver's view of the train coming from the north.

The contention that the verdict is against the manifest weight of the evidence is limited to the evidence concerning the railway crossing. It is the plaintiffs' position that they proved the crossing was hazardous and that the defendant produced no proof to the contrary. The argument

follows that they made out a prima facie case and that it thereupon became the defendant's obligation to go forward with the evidence, and by failing to do so the verdict in the defendant's favor is both unsupported by evidence and is against the manifest weight of the evidence. This argument is fallacious for several reasons. The plaintiffs' evidence did not prove that the crossing was exceptionally dangerous as a matter of law. Their evidence was sufficient to take to the jury the charge in their complaint that the defendant negligently operated, maintained and controlled the crossing. There was evidence on the defendant's part concerning the crossing and the opportunity for a reasonably careful driver to see or become aware of the tracks and an approaching train. This evidence showed that a new and freshly painted warning sign had been installed during the summer of 1955; it showed that the sign was lighted by the auto, for the engineer saw the auto lights reflected from the sign; it showed that the lights of the auto could be seen from the train when it was 360 feet from the crossing, and certainly a reasonable inference would be that the headlights of the passenger train (an oscillating, flashing light which was 10-1/2 feet, and the other a stationary one 8 feet above the rails) could be seen without difficulty from the auto at an equal distance; it showed that the occupants of the auto were well above the slight depression in which the street and tracks lay and that the train and its lights were well above them, and it showed that the Cole car had

to pass over one set of tracks before coming to those for southbound trains. It was the jury's responsibility to determine if the defendant exercised ordinary and reasonable care in maintaining its crossing in a reasonably safe condition, or if the fulfillment of its duty to do so required gates or other safety devices. Hughes v. Wabash R. Co., 342 Ill. App. 159, 95 N.E.2d 735; Maltby v. Chicago Great Western Ry. Co., 347 Ill. App. 441, 106 N.E.2d 879. The jury resolved this issue in favor of the defendant and its verdict was supported by evidence and was not against the manifest weight of the evidence.

The plaintiffs next complain of the admission of certain evidence and the refusal to admit other evidence. None of these points were specified in their post-trial motion. The only reference to evidence in the motion (other than that the verdict was contrary to the evidence) was the following: "Throughout the trial, counsel for the defendant attempted to introduce improper and prejudicial evidence." This allegation did not meet the requirement of the statute that all points urged as grounds for a new trial be particularly specified. Ill. Rev. Stat., ch. 110, sec. 68-1 (1959). The plaintiffs, therefore, are precluded from raising these points on review. Perez v. B. & O. R. Co., 24 Ill. App. 2d 204, 164 N.E.2d 209.

Although the evidence was not objected to in the post-trial motion the instructions were. Four of these are criticized. They are in two pairs and the general objection is that the words of the instructions in each pair are the

same, with the exception of the name of the plaintiff. This resulted in the court instructing the jury more than once on certain propositions of law. The criticism is well taken but it applies also to some of the plaintiffs' instructions. The error, which in this instance was not of a prejudicial character, was perhaps induced by the consolidation of two causes of action, wrongful death and personal injury. This necessitated separate instructions on the subject of damages and the pattern seems to have carried over into the other instructions.

A far more serious criticism is the content of two of the instructions. One of this identical pair reads as follows:

> "Contributory negligence, in the case of Charlotte Cole, is the failure by her to use reasonable care for her own safety just before and at the time of the occurrence in question, which failure proximately contributed to cause the injury of which complaint is made by Charlotte Cole."

These defense-drawn instructions purport to be definitions of contributory negligence but they are so worded that they are easily susceptible to another interpretation. The words "Contributory negligence...<u>is</u> the failure <u>by her</u> to use reasonable care...<u>which failure</u> proximately contributed to cause the injury..." can just as readily be taken to mean that the plaintiff was guilty of such negligence. There was no other instruction which otherwise defined contributory negligence or which in any way clarified Charlotte's Cole's and Emmaneal Johnson's duty of exercising care for their own safety,

although the jury was told that they could not recover unless they proved that they exercised such care.

This was a close case--a jury had disagreed in a previous trial--and it was essential that the jury be correctly instructed. The element of contributory negligence was of great importance. In finding the defendant not guilty the jury had to conclude either that the defendant committed no negligent act or, if it did, that the plaintiffs were contributorily negligent. If the jury believed that the driver of the car and the defendant were both negligent the plaintiffs could still recover unless they themselves were guilty of contributory negligence. Any negligence of Cole could not be imputed to them as passengers. They were not, as a matter of law, exercising ordinary care as they contend, nor did they, as a matter of law, fail to exercise ordinary care as the defendant contends. It was their burden to establish their own freedom from negligence and this issue was one of fact for the jury.

It was therefore serious error for the defense to have instructions given from which the jury could infer that the court was saying that Charlotte Cole and Emmaneal Johnson were guilty of contributory negligence. Reviewing courts are reluctant to reverse a case because of technical errors in instructions and will avoid doing so if the instructions, considered as a series, have not misled the jury and have not prejudiced the losing party. In this close case the jury could have been misled and the plaintiffs prejudiced

by the erroneous instructions which were neither cured nor clarified by any other instruction.

Reversed and remanded.

McCormick, P.J., and Schwartz, J., concur.

Abstract only.

48412

ARON BARTLETT,	)	
	)	APPEAL FROM
Plaintiff-Appellant,	)	
	)	THE MUNICIPAL COURT
vs.	)	
	)	OF CHICAGO
CHICAGO TRANSIT AUTHORITY, a Municipal Corporation,	)	
	)	
Defendant-Appellee.	)	

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MR. JUSTICE ENGLISH DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for defendant based on a jury verdict of not guilty in an action for personal injuries.

Without contradiction, it appears from the record that on the evening of April 24, 1955, plaintiff had been engaged in an altercation with his wife during which she had struck him in the face with a flat iron, injuring him to such an extent that it was necessary for him to be driven to the hospital for medical treatment, including a patch over one eye. He was driven home again that night. The next morning, at about 8 A.M., plaintiff was a passenger on defendant's bus on his way to work.* When directly in front of plaintiff's place of employment, the driver

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* In its brief, defendant argues the point that plaintiff was not on the bus. Since the Statement of Claim alleged that plaintiff was a passenger for hire, and this allegation was not denied by the Defense, it stands admitted. (Ill. Rev. Stats., Chap. 110, § 40(2).) The point is, therefore, not available in this court and was expressly waived by defendant on oral argument.

lost control of the bus and it struck an elevated structure. At about the time of the bus accident, or immediately after it, plaintiff went to the second-floor personnel office at his place of employment and asked the safety engineer for permission to see the company doctor. Plaintiff had a bandage on his eye at the time and stated that his wife had struck him with an iron. He did not, however, say anything about having been hurt in a bus accident. He did not limp and did not appear to be in pain. Permission to see the company doctor was denied because the injuries complained of had not been incurred in the course of plaintiff's employment. Plaintiff then went out and was taken with other bus passengers to the hospital where he was treated for injuries to his back and knee and was listed with others as having been injured in the bus accident. Plaintiff went home from the hospital by bus and remained away from his job until June 1, 1955. A doctor continued to treat his back and leg until July 20.

Plaintiff testified that at the time of the accident he was in the aisle of the bus preparing to get off; that he was thrown forward to the floor, thereby sustaining injuries to his back and leg, and had to be helped to his feet by a woman passenger; that he tried to see the company doctor and, when unsuccessful, returned to the bus and joined other passengers in going to the hospital by ambulance.

The bus driver testified that he looked around in the bus immediately after the impact and there was nobody on the floor. He testified further that he saw no passenger with a bandage over his eye; that all the passengers left the bus without assistance through the rear door; that he told the passengers to wait at the scene for an ambulance which would transport to the hospital all who might be in need of medical attention; that the ambulance came within less than fifteen minutes.

Plaintiff contends that the trial court should have directed a verdict in his favor on the question of liability, and that the not guilty verdict is contrary to the manifest weight of the evidence and should, therefore, be set aside.

It is our opinion that the trial court did not err in denying plaintiff's motion for a directed verdict. There was evidence which, when considered alone and with every reasonable inference therefrom, tended to sustain defendant's contention that plaintiff was not injured in the bus accident. (Palmer v. Hunter, 24 Ill. App. 2d 68.)

Furthermore, we believe that the evidence negativing plaintiff's claim amply justified the jury's verdict and would prompt us to reach the same conclusion. Even if we were not so inclined, we would not be permitted to substitute our judgment for that of the jury, since a result contrary to the verdict is not clearly required by the evidence. (Romines v. Illinois Motor Freight, Inc., 21 Ill. App. 2d 380.)

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

MURPHY, P.J., and BURMAN, J., concur.

ABSTRACT ONLY.

48596

RICHARD M. RUTLEDGE, M.D., Plaintiff-Appellant, vs. WILLIAM SYLVESTER WHITE, Individually and as Director of the Department of Registration and Education of the State of Illinois, and DOCTORS PHILIP THOMPSEN, KENNETH SCHNEPP, B. E. MONTGOMERY, JOHN B. FOWLER, JR. and WILLIAM JOHNSON, constituting the Medical Committee of the Department of Registration and Education of the State of Illinois, Defendants-Appellees.	)	INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This appeal is from an interlocutory order of the Circuit Court denying plaintiff's motion for a temporary injunction to restrain defendants from proceeding with a hearing for the revocation or suspension of plaintiff's license to practice medicine and surgery. The only pleading on file was plaintiff's verified complaint.

Plaintiff alleged that he is a physician duly licensed in the State of Illinois; that on June 24, 1961, defendant, William Sylvester White, Director of the Department of Registration and Education of the State of Illinois, served Rutledge with a citation notifying him that a sworn complaint, a copy of which was attached, had been filed against him which directed him to appear

before the Medical Committee* at a hearing to be held on July 27, 1961, and informed plaintiff that he would have 20 days in which to file his answer. The attached complaint charged in substance that plaintiff was "grossly negligent" in the performance of surgery upon Velma F. Meyer on July 3, 1958, which resulted in permanent injuries to said patient.

Plaintiff further alleged that the Department lacks jurisdiction to proceed with the hearing on the complaint for the reasons that the complaint is defective and void; that any complaint filed thereafter would fall within the three-year statute of limitations contained in the Medical Practice Act, and the Department is proceeding to a hearing without first ruling on plaintiff's motion before them to strike the complaint. Plaintiff alleged the complaint to be defective and void in that (1) it fails to set forth the particular acts charged against plaintiff, as required by § 16b, ch. 91, Ill. Rev. Stat. (1961); (2) its verification is not properly sworn to within the meaning of § 16b; and (3) it failed to state a cause of action in that the charge of "gross negligence" causing permanent injury is not a statutory

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* Consisting of Doctors Philip Thompsen, B. E. Montgomery, Kenneth Schnepp, John B. Fowler, Jr. and William Johnson, all of whom are also defendants.

ground for revocation of a physician's license. Alleging further that if the Department held a hearing despite its lack of jurisdiction plaintiff would be "held up to ridicule, scorn and derision" and he would lose "a valuable medical practice, with its resultant pecuniary loss, and ... suffer irreparable damage," and that he has no adequate remedy at law, plaintiff prayed for both temporary and permanent injunctions to prevent the Department from conducting a hearing on the complaint before it.

We must bear in mind the well settled rule that "a prerequisite to the exercise of the extraordinary relief of injunctive remedy is the showing of irreparable harm...." (McFetridge v. First Commercial Bank, 28 Ill. App. 2d 512, 524). We find no such showing in the complaint.

The Medical Practice Act (§ 16b-2, ch. 91, Ill. Rev. Stat. 1961) makes "all final administrative decisions" involving the revocation of physicians' and surgeons' licenses "subject to judicial review pursuant to the provisions of the 'Administrative Review Act'...." Plaintiff argues, however, that he is not seeking the review of any final decision of the Department. He contends that because the director is proceeding upon a defective complaint the proceedings are void at their inception, and plaintiff is therefore entitled to go outside the Administrative Review Act and challenge the proceedings by way of injunction. We are unable to agree with plaintiff's conclusions. Procedures for conducting hearings under the Medical Practice Act would be meaningless if

all of its proceedings could be enjoined for the reasons set forth in the complaint. We agree with defendant that remedies provided under the Administrative Review Act are applicable even where administrative proceedings and judicial review have not been completed. See People ex rel. Carpentier v. Goers, 20 Ill. 2d 272.

We are not passing on the facts in this case. Even assuming that the director is in error in proceeding with the hearing, the question, as we see it, is whether plaintiff can adequately protect his rights. We find that he can. The issues in the complaint at bar can be adequately raised during the proceedings before the committee and its director, and can be preserved for review under the provisions of the Administrative Review Act.

Plaintiff relies heavily upon Kalman v. Walsh, 355 Ill. 341, where the Supreme Court held that an injunction would lie to restrain proceedings contemplating the revocation of a dentist's license. This ruling is not determinative of the question before us since it was promulgated before the Administrative Review Act was made applicable to proceedings contemplating or culminating in the revocation of licenses of physicians and surgeons.

The granting or refusing of a temporary injunction rests largely in the sound discretion of the Chancellor (Bowman Shoe Co. v. Bowman, 21 Ill. App. 2d 423) and we can here find no abuse of discretion.

The decision of the Circuit Court is affirmed.

AFFIRMED.

MURPHY, P.J., and ENGLISH, J., concur.

Abstract only.

NO. 11524 Abstract Agenda 1

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
OCTOBER TERM, A.D. 1961

CLARENCE NEFF, ET AL, Plaintiffs-Appellants, vs. THE STATE BANK OF WOODSTOCK, a corporation, ET AL, Defendants-Appellees.	Appeal from the Circuit Court, Kane County.

McNEAL, J. -

The Circuit Court of Kane County entered a final decree dismissing plaintiffs' complaint for an injunction, and plaintiffs appealed.

The record reveals that on September 9, 1959, Theodore L. Hamer filed suit against First American Acceptance Corporation, hereinafter referred to as F.A.A.C., and certain individuals, alleging that he owned 500 shares in the corporation; that he brought the action on behalf of himself and other shareholders; that the individual defendants were officers and directors of F.A.A.C. and also of Mid-Union Indemnity Company; that Mid-Union was insolvent; and that the individual defendants, acting as officers and directors of F.A.A.C., improperly loaned $800,000 to Mid-Union. The complaint prayed for an accounting and attorney fees. On February 26, 1960, the complaint was amended by adding George J. Hubert and others as parties plaintiff and by making further charges against the defendants.

The record also shows that on April 25, 1960, Henry A. Eggers, George J. Hubert, Arthur J. Fritz, and others filed suit against F.A.A.C. and the same persons named as defendants in the suit filed September 9,

No. 11,[illegible] Abstract Agenda 1

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
October Term, A.D. 1960

FILED
Dec. 1960
PAUL V. WUNDER
Clerk Appellate Court Second District

CLARENCE MERY, ET AL., Plaintiffs-Appellants, vs. THE STATE BANK OF WOODSTOCK, a corporation, et al., Defendants-Appellees.	Appeal from the Circuit Court, McHenry County.

McNEAL, J. -

The Circuit Court of McHenry County entered a final decree dismissing plaintiffs' complaint for an injunction, and plaintiffs appealed.

The record reveals that on September 2, 1959, Theodore J. Hamer filed suit against First American Acceptance Corporation, hereinafter referred to as F.A.A.C., and certain individuals, alleging that he owned 200 shares in the corporation, that he brought the action on behalf of himself and other shareholders, that the individual defendants were officers and directors of F.A.A.C. and also of Mid-Union Indemnity Company, that Mid-Union was involved; and that the individual defendants, acting as officers and directors of F.A.A.C., improperly loaned $700,000 to Mid-Union. The complaint prayed for an accounting and attorney fees. On February 22, 1960, the complaint was amended by adding George J. Hubert and others as parties plaintiff and by making further charges against the defendants.

The record also shows that on April 22, 1960, Henry A. Edgers, George J. Hubert, Arthur J. Fritz, and others filed suit against F.A.A.C. and the same persons named as defendants in the suit filed September 2,

1959. The complaint alleged that plaintiffs were shareholders in F.A.A.C. and that their stock had been sold to them in violation of the Illinois Securities Act. The plaintiffs tendered their stock into court and asked that the sums paid therefor be returned together with interest and attorneys fees.

The complaint in the instant case was filed on May 23, 1960, by Clarence Neff, Robert L. Holt and Charles W. Lantis, three of the defendants named in the suits filed by Hamer and by Eggers and others. The complaint was amended on July 12, 1960. As amended, it was directed against Theodore L. Hamer, Arthur J. Fritz, George J. Hubert, State Bank of Woodstock and others, and alleged that Hamer, Fritz, Hubert, and the Bank conspired to promote the Hamer suit and the Eggers suit and that their acts constituted champerty and maintenance and a conspiracy to do an illegal act or acts. Plaintiffs prayed that further proceedings in the Hamer and Eggers suits be enjoined, and that plaintiffs be awarded actual and punitive damages in the sum of $500,000. Exhibits attached to the amended complaint included a consent by Hamer, Fritz and Hubert to act as a shareholders' protective committee and a form of a deposit agreement and power of attorney to be signed by the shareholders. The consent signed by Hamer, Fritz and Hubert was addressed to the shareholders of F.A.A.C. and advised them that the signers had consented to act as a shareholders' committee to recover the $800,000 loaned to an insolvent company and also to enforce liability for acts in connection with the improper sale of stock. The shareholders were urged to deposit their shares of stock in F.A.A.C. with the Bank, and to sign powers of attorney appointing Hamer, Fritz, and Hubert as attorneys and authorizing them to carry on the Hamer and the Eggers suits.

In response to the amended complaint in the instant case several defendants filed various pleadings. Hamer filed a motion to dismiss on the grounds that the amended complaint was substantially insufficient because it failed to set forth facts showing any

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1929. The complaint alleged that plaintiffs were shareholders in P.L.E.C. and that their stock had been sold to them in violation of the Illinois Securities act. The plaintiffs tendered their stock into court and asked that the sums paid therefor be returned together with interest and attorneys fees.

The complaint in the instant case was filed on May 21, 1940, by Clarence Neff, Robert E. Holt and Charles T. Lemcke, three of the defendants named in the suits filed by Bauer and by Lippert and others. The complaint was amended on July 12, 1940. As amended, it was directed against Theodore E. Bauer, Arthur J. Fritz, Harry C. Lubert, State Bank of Pontiac and others, and alleged that Bauer, Fritz, Lubert, and the Bank conspired to promote the Bauer suit and the Lippert suit and thus their acts constituted champerty and maintenance and a conspiracy to do an illegal act or acts. Plaintiffs prayed that further proceedings in the Bauer and Lippert suits be enjoined, and that plaintiffs be awarded actual and punitive damages in the sum of $250,000. Damages attached to the amended complaint included a counsel fee for Bauer, Fritz and Lubert in such an a stockholders' derivative complaint and a fund of a legal guarantee and power of attorney to be signed by the shareholders. The accounts signed by Bauer, Fritz and Lubert was delivered to the shareholders of P.L.E.C. The contention that the signers had conspired to act as a shareholders' committee to recover the $800,000 loaned to an insolvent company and also to enforce liability for sale to unauthorized with the Bauer suit of plaintiff. The shareholders were urged to deposit their shares of stock in P.L.E.C. with the Bank, and to sign powers of attorney authorizing Bauer, Fritz, and Lubert to commence and successfully close to carry on the Bauer and the Lippert suits.

In response to the amended complaint in the instant case several defendants filed various pleadings. Some filed a motion to dismiss on the grounds that the amended complaint was substantially insufficient because it failed to set forth facts showing any

conspiracy or any champerty or maintenance. Although the Hamer and Eggers suits were also filed in the Circuit Court of Kane County, copies of the complaints filed in those suits were attached to Hamer's motion to dismiss. The motion was sustained, and a final decree entered denying application for a temporary injunction and dismissing the amended complaint for want of equity. Neff, Holt and Lantis appealed.

Counsel for appellants rely primarily upon Atchison, T. & S. F. Ry. Co. v. Andrews, 338 Ill. App. 552. In that case an attorney was enjoined from prosecuting a large number of personal injury claims which had been improperly solicited. However, the plaintiffs in those suits were not enjoined from further pursuing their claims. We do not consider the Andrews case to be analogous to the instant case, and do not regard it as authority preventing shareholders in a corporation from bringing action against officers and directors of the corporation for alleged wrongful conduct.

A conspiracy is a combination between two or more persons to do an unlawful act, or to do a lawful act by unlawful means. 11 I.L.P. 97, Conspiracy Sec. 2. In the case at bar, the filing of a complaint against the officers and directors of a corporation seeking redress for improper conduct cannot be said to constitute an unlawful act, and the mere fact that several stockholders join in the action does not constitute the doing of a lawful act by unlawful means.

As to the charges of champerty and maintenance, champerty constitutes an agreement to pay for litigation in return for a part of the proceeds, and maintenance consists of officious intermeddling in a suit in which one has no interest. 14 C.J.S. 356, Champerty and Maintenance Sec. 1. In Brush v. City of Carbondale, 229 Ill. 144, 152, the Supreme Court said "that there are two essential elements in every champertous agreement: First, there must be an undertaking by one person to defray the expenses, in whole or in part, of another's suit; second, an agreement or promise on the part of the latter to divide with the former the proceeds of the litigation in the event the

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82 NE 2525

conspiracy or any champerty or maintenance. Although the Hearst and Sayers suits were also filed in the Circuit Court of Lake County, copies of the complaints filed in these suits were attached to Hearst's motion to dismiss. The motion was sustained, and a final decree entered denying application for a temporary injunction and dismissing the amended complaint for want of equity. Hall, Hall and Lewis appealed.

Counsel for appellants rely primarily upon Atchison, T. & S. F. Ry. Co. v. Andrews, 334 Ill. App. 592, in that case an attorney was enjoined from prosecuting a large number of personal injury claims which had been improperly solicited. However, the plaintiffs in these suits were not enjoined from further pursuing their claims. We do not consider the instant case to be analogous to the instant case, and do not regard it as authority preventing absentees in a corporation from bringing action against officers and directors of the corporation for alleged wrongful conduct.

A conspiracy is a combination between two or more persons to do an unlawful act, or to do a lawful act by unlawful means. Il I.L.P. 37, Conspiracy Sec. 2. In the case at bar, the filing of a complaint against the officers and directors of a corporation seeking redress for improper conduct cannot be said to constitute an unlawful act, and the mere fact that several stockholders join in the action does not constitute the doing of a lawful act by unlawful means.

As to the charges of champerty and maintenance, champerty constitutes an agreement to pay for litigation in return for a part of the proceeds, and maintenance consists of officious intermeddling in a suit in which one has no interest. Id. Ch. 3, 376, Champerty and Maintenance Sec. 1. In Brown v. City of Carbondale, 229 Ill. 144, 172, the Supreme Court said "that there are two essential elements in every champertous agreement: first, there must be an undertaking by one person to defray the expenses, in whole or in part, of another's suit; second, an agreement or grounds on the part of the latter to divide with the former the proceeds of the litigation to the extent the

prosecution was successful." Concerning maintenance, in Elser v. Village of Gross Point, 223 Ill. 230, 239, 79 NE 275 the Court said:

> "In a case where a common right is involved, the participation of any party having an interest in the result of the litigation cannot be held to be evidence of champerty or maintenance. It is said that any interest whatever in the subject matter of the litigation is sufficient to exempt one who gives aid from a charge of illegal maintenance."

Turning to the instant case, the amended complaint wholly fails to allege facts showing any champerty or maintenance. There is no allegation that the Eggers and Hamer cases are being financed by someone not interested therein in return for part of the proceeds. In fact, the record shows that the plaintiffs in both cases are all shareholders in F.A.A.C. and all have a real and common interest in such suits. We believe that the chancellor was correct in dismissing the amended complaint for want of equity and in refusing to delay the prosecution of the Hamer and Eggers suits. However, nothing contained in this decision is to be construed as an expression of any opinion as to the merits of those suits.

Accordingly, it is our conclusion that the decree entered by the Circuit Court of Kane County was correct, and it should be and it hereby is affirmed.

¶ Affirmed.

DOVE, P.J., and SMITH, J., concur.

prosecution was successful." Interesting enough, in Ozer v. Village of Green Tree, 301 Ill. 210, 133 N.E. 78 (1922), the court said:

> "In a case where a person is charged by involuntary participation of any party having an interest in the result of the litigation cannot be held to be evidence of character or antecedents. It is held that an injured employee in the employer action after intoxication is sufficient to impair and the proof of degree of illegal maintenance.

Turning to the instant case, the learned magistrate would fail to allege facts showing any showing or maintenance. There is no indication that the lessee and lessor were aware of illegal by accepting any information already in process for sale of the premises in 1971, the record shows that the plaintiffs in fact made the illegal information in R.L.I.T. and all have a real the lessee knowing to and notice. I believe that the chancellor's decision in dismissing the amended complaint for want of equity was in keeping on taking the pre-conditions of the lease and lessee notice. However, nothing contained in this decision is to be construed as an adjudication of any opinion as to the merits of these cases.

Accordingly, it is our conclusion that the decree rendered by the Circuit Court of Cook County was proper, and it should be and it hereby is affirmed.

Affirmed.

DIZ, P.J., and SMITH, J., concur.

A

48195

EMIL A. DENZ,	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
v.	)	MUNICIPAL COURT
GEORGE GAVORA,	)	OF CHICAGO.
Defendant-Appellant.	)	

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The plaintiff, Emil Denz, had devised, and was the manufacturer of, automatic potato chip machines. In November 1954 he and the defendant, George Gavora, entered into a contract which provided that he would sell all the assets of his business to Gavora and would devote his time to developing and selling the machines. He was paid $500.00 and the contract stated that he would receive 10% of the stock of a new corporation to be formed by Gavora, 10% of the selling price for each machine sold and 5% of the rental for each machine rented by the new corporation.

His complaint charged that after he had delivered all his equipment, including completed and partially completed machines, the defendant refused to form the corporation and did nothing to promote the manufacture, sale or distribution of the machines, whereupon he demanded his property and offered to return the $500.00. He claimed that he had been defrauded because of his reliance upon the false representations knowingly made by the defendant.

He asked damages for the value of his equipment, for the profit which would have been his if he had sold the delivered machines himself and for punitive damages of $5,000.00.

The defendant answered that the machines could not be sold because they did not produce a satisfactory product and that it was understood at all times between the plaintiff and the defendant that they would have to be redesigned. The answer stated that it was also understood that no corporation would be formed until the redesigning was complete and until the parties entered into a more formal contract; that the defendant had tried and was ready to perform all his obligations but that the plaintiff refused to sign the formal contract and refused to cooperate in the development of the machines. The defendant declared that he offered to return everything to the plaintiff if the latter repaid the $500.00, but that the plaintiff declined.

A verdict of $9,000.00 was returned for the plaintiff. The defendant's appeal is predicated upon the contention that recovery cannot be had for loss of profits which are merely remote or speculative, and upon the trial court's refusing to admit into evidence a defendant's exhibit and giving a certain plaintiff's instruction.

The last two alleged errors were not specified in the post-trial motion. As to the evidence refused, the motion stated: "The court erred in excluding competent and proper evidence offered by the defendant." As to the instruction given, the motion stated: "The court erred in its instructions to the jury." These are the most general of objections; they fall far short of the standard required by the Civil Practice Act: "The post-trial motion must contain the points relied upon, particularly specifying the grounds in support thereof,..." Ill. Rev. Stat. 110, para. 68.1(2)(1959). This statute has been held to apply to both evidence and instructions, and our reviewing courts have refused to consider assignment of errors which were not particularized in post-trial motions. Perez v. B. & O. R.R. Co., 24 Ill. App. 2d 204, 164 N.E.2d 209; Rudolph v. City of Chicago, 2 Ill. App. 2d 370, 119 N.E.2d 528.

One point in the post-trial motion relates to the third assignment of error made in this court, that recovery cannot be had for loss of profits which are remote or speculative. The point was, "The Court erred in admitting testimony offered by the plaintiff as to past and possible future profits claimed to have been lost by the plaintiff as the result of an alleged breach of contract on the part of the defendant." The record discloses that no

objection was made to the plaintiff's testimony about the profits made by him prior to the contract, nor was any objection made to his testimony concerning possible future profits. Therefore, the defendant was in no position to claim the court erred and his point, as it was expressed in his post-trial motion, was without merit. However, we will interpret the point as being broad enough to cover the third assignment of error and we will consider the latter.

The defendant refers to two cases in support of the proposition that no recovery can be had for loss of profits which are imaginary and which cannot, from the evidence produced at a trial, be determined with reasonable certainty. The first of these was an action on the case: Salaban v. East St. L. & I. Water Co., 284 Ill. App. 358. A restaurant and rooming house keeper had a dispute with a public utility which supplied water. As a result of the dispute the utility refused to furnish the plaintiff water for a few months. The plaintiff claimed his business was damaged because of this. The court held that the trial court correctly directed a verdict for the defendant at the close of the plaintiff's case as the plaintiff had failed to prove that his trade left him because of lack of water. The court also said that he had laid no foundation upon which damages could be based, that the only

evidence was his own testimony that he sometimes made as much as $350.00 a month from his business, that this proof was inadequate and the damages sought for loss of probable profits were too remote.

The second case, Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542, was an action by a company promoting sports events against a professional boxer for breach of a contract. In reversing the decision for the defendant the court considered various items of damages for which offers of proof had been made, which would arise again in the second trial. One of these was the loss of $1,600,000.00 in estimated profits from the boxing match, if the defendant had performed his contract. The court said:

> "The profits from a boxing contest of this character, open to the public, is dependent upon so many different circumstances that they are not susceptible of definite legal determination.... Compensation for damages for a breach of contract must be established by evidence from which a court or jury are able to ascertain the extent of such damage by the usual rules of evidence and to a reasonable degree of certainty. We are of the opinion that...the damages, if any, are purely speculative."

Neither of these cases parallel the case at bar. The plaintiff here was not seeking recovery for damages which could not be reasonably approximated. He did not ask compensation for conjectural future profits. He sought recovery only for the profits which would have been his had he retained and sold the four completed and the seven uncompleted machines. Denz had sold some of the machines

prior to the contarct; in 1953 he sold one for $1,250.00. There was evidence that the cost of making each machine was $435.00 and that the selling price was from $975.00 to $1,250.00. The manufacturing cost of the eleven machines would total $4,785.00. If the eleven machines were sold at the minimum price of $975.00, the total received would be $10,725.00. The profit on the eleven machines would be $5,940.00. This figure is not the speculative, remote profit mentioned in the Salaban and Coliseum cases. A loss of profits is recoverable if the loss can, with reasonable certainty, be fairly estimated upon tangible, competent evidence, Meyer v. Buckman, 7 Ill. App. 2d 385, 129 N.E.2d 603.

In addition to the loss of profits, Denz sued for the value of the tools, patterns, machines and equipment delivered to Gavora. This was said to be $4,363.25. If we add this to the $5,940.00 profit figure the total is $10,303.25. If the $500.00 paid to Denz is deducted from this total, the balance of $9,803.25 is larger than the verdict of $9,000.00. Inasmuch as the jury accepted the plaintiff's version of the transaction, the verdict of $9,000.00 was less than the evidence warranted, and this without allowing for any punitive damages that may have been included in the verdict.

The judgment of the Municipal Court will be affirmed.

Affirmed.

McCormick, P.J., and Schwartz, J., concur.

Abstract only.

48272

DOROTHY B. MILLER, Appellant, v. BOARD OF APPEALS OF THE CITY OF CHICAGO, et al., Appellees.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

Dorothy B. Miller, hereafter referred to as the plaintiff, filed an application with the zoning board of appeals of the City of Chicago for a variation in the nature of a special use under the provisions of the Chicago zoning ordinance. The application was denied and the plaintiff filed an appeal in the Circuit Court of Cook County under the Administrative Review Act. This appeal is taken from the judgment order entered in the Circuit Court sustaining the ruling of the zoning board of appeals.

The plaintiff is the owner of property located at 4014 North Drake Avenue in Chicago, located in an R3 residence district, which is limited to family dwellings. An alley runs parallel to the south boundary of the property, and there is an alley in the rear of the said property. Adjoining the alley which runs east and west is a one-story retail store building approximately 115 feet deep, which is located on the north side of Irving Park Road and runs from Drake Avenue to Central Park Avenue, with the exception that there is a piece of vacant property in back of the west end of the building which is used for the parking of automobiles. The

plaintiff's property is improved with a two-story frame building, with two garages in the rear.

The plaintiff filed an application under the zoning ordinance for the approval of the location and establishment of a parking lot for the storage of private passenger automobiles on her premises. Attached thereto was a letter from the commissioner of city planning of the City of Chicago certifying that there was no objection from a traffic standpoint and that the property appears to qualify for an accessory parking lot. This application was denied by the office of the zoning administrator on the ground that the improvement did not conform with the ordinances. The plaintiff thereupon filed an application with the zoning board of appeals for Chicago for a variation in the nature of a special use under the Chicago zoning ordinance and gave the requisite statutory notices. The zoning board of appeals, after hearing, denied the application.

The Chicago zoning ordinance provided that any use allowed as a special use in an R1 district would be allowed in an R3 district. The ordinance provided that in an R1 district an automobile parking lot would be allowed in a residence district on a lot not over 75 feet wide where the lot abuts at a side lot line a business, commercial or manufacturing district, or is separated only by an alley along a side lot line from property in a business, commercial or manufacturing district. It further provides that the parking lot shall be used solely for the parking of passenger automobiles and shall be closed between 10:00 p.m. and 7:00

a.m. except as may otherwise be provided by the zoning administrator, and further provisions are made concerning ingress and egress to such lot. The ordinance also provides that "variations in the nature of special uses may be authorized by the Zoning Board of Appeals * * *" provided a public hearing is noticed and held before the zoning board of appeals, and the ordinance further states: "No special use shall be granted by the Zoning Board of Appeals unless the special use: (1) a. is necessary for the public convenience at that location; b. is so designed, located and proposed to be operated that the public health, safety and welfare will be protected; and (2) will not cause substantial injury to the value of other property in the neighborhood in which it is to be located; * * *."

The theory of the plaintiff here is that the denial of her application by the zoning board of appeals was against the manifest weight of the evidence.

An answer was filed to plaintiff's complaint by the board of appeals of the City of Chicago containing a complete record of the proceedings had before the zoning board of appeals. An answer was also filed on behalf of many of the property owners in the neighborhood of 4014 North Drake Avenue.

At the hearing before the board of appeals three witnesses testified on behalf of the plaintiff. One of the witnesses was the owner of the building which was to be serviced by the proposed parking lot, which he had contracted to purchase. Another was a representative of Jewel Tea

Company, a tenant in the building. The third was the president and director of Irving Savings and Loan Association and chairman of the Irving Elston Chamber of Commerce. The hearing was conducted in a highly informal manner. Certain property owners were present who made statements to the board indicating their objection to the proposed parking lot, although they were not sworn, nor did they formally testify. In addition the zoning commission permitted the filing of letters from several persons residing in the district objecting to the parking lot, together with a petition objecting to a zoning variation of the property. A resident in the district stated to the board that she had circulated the petition and that when she circulated it she had informed those signing it that it was for the purpose of objecting to the use of the property as a parking lot. No objection was made at the hearing to either the statements of the residents or to the filing of the letters and the petition, and it must be assumed that the zoning board considered them along with the other evidence before it.

No evidence was offered on behalf of the defendants outside of the letters and the petition heretofore referred to.

It is the position of the board of appeals that the plaintiff did not clearly establish by competent evidence that she was entitled to a special use, and that she had failed to show that the special use was necessary for public convenience at that location in accordance with the terms of the ordinance.

The plaintiff here argues that since the only formal evidence heard by the board was testimony of witnesses on her behalf, the board therefore was bound to rule in her favor and that any adverse ruling was against the manifest weight of the evidence. The defendants argue that there is a fair difference of opinion as to whether or not the plaintiff failed to prove that she had met every one of the requirements requisite for the granting of a special use, and particularly that the question as to whether the special use was necessary for the public convenience at the location was debatable.

It has been repeatedly held by our Supreme Court that the only function of courts reviewing orders of administrative agencies is to consider the record and to determine whether the findings and decision of the administrative agency are against the manifest weight of the evidence. Drezner v. Civil Service Com., 398 Ill. 219, 75 N.E.2d 303; Brown Shoe Co. v. Gordon, 405 Ill. 384, 91 N.E.2d 381; Oswald v. Civil Service Com., 406 Ill. 506; 94 N.E.2d 311; Parker v. Dept. of Registration, 5 Ill. 2d 288, 125 N.E.2d 494; Downey v. Grimshaw, 410 Ill. 21, 101 N.E.2d 275. In Rosenfeld v. Zoning Board of Appeals of Chicago, 19 Ill. App.2d 447, 154 N.E.2d 323, Mr. Justice Kiley said:

> "The 'special use' power delegated to the Board of Appeals is to be applied in cases of necessity 'for public convenience'; and a 'parking lot' is an authorized 'special use' by section 24 of the City Zoning Law. It differs from a 'variance' in that a 'special use' is a permission by the Board to an owner to use his property in a manner contrary to the ordinance provided that the intended use is one of those specifically listed in the ordinance and provided that the public convenience will be served by the use, while a variance is a grant of relief

> to an owner from the literal requirements of the ordinance where literal enforcement would cause him undue hardship. Yokley, Zoning Law and Practice, sec. 134."

See also Metzenbaum, The Law of Zoning, 2nd ed., vol. 1, page 819.

In Wiegan v. Board of Standards and Appeals, 229 App. Div. 320, 241 N.Y.S. 456, the court says:

> "Unless the court is to substitute its judgment for that of the board, it is difficult to see how the order appealed from may be sustained. In Lincoln Trust Co. Williams Building Corporation, 229 N. Y. 313, 128 N. E. 209, the court, in construing the validity of the Building Zone Resolution and the powers of municipal officials thereunder, said at page 317 of 229 N. Y., 128 N.E. 209, 210:
>
> "'The exercise of such power, within constitutional limitations, depends largely upon the discretion and good judgment of the municipal authorities, with which the courts are reluctant to interfere."

In Costantino v. Zoning Board of Review, 74 R.I. 316, 60 A.2d 478, the court says, with reference to the power conferred upon a zoning board to grant exceptions or special uses:

> "The power thus conferred upon the board is, indeed, very broad and can easily be abused. Therefore it has been generally held * * * that such exceptions should be sparingly granted."

In the hearing before the zoning board of appeals in the instant case the matter presented for its determination was whether the plaintiff had presented evidence which would justify the board in granting the "special use" sought. As we have stated, the hearing was conducted informally. There was testimony that the parking conditions on Irving Park Road were bad; that the tenants of the stores in the building to be serviced by the proposed parking lot complained that their customers had no place to park; and that the proposed parking

lot would accommodate 20 cars. There was testimony that in the opinion of one witness the proposed parking lot would relieve parking congestion and permit owners of property in the neighborhood to park their cars in front of their property, and that in the opinion of other witnesses such a parking lot would not depreciate the property in the district. There was filed with the board a petition by the residents objecting to the establishment of the parking lot. The public, at least insofar as it was represented by the residents in the district appearing before the board and those who had signed the petition and had written letters adverse to the petition of the plaintiff, did not consider that it was for their convenience. The ordinance provides that the variations in the nature of special uses may be authorized by the zoning board of appeals (italics ours). In Downey v. Grimshaw, supra, the court says:

> "In ascertaining whether a particular zoning ordinance is in the interest of the public welfare, each case must be determined upon its own peculiar facts. * * * [Citing cases.] Where there is room for a legitimate difference of opinion concerning the reasonableness of a particular zoning ordinance, the finding of the legislative body will not be disturbed. * * *"

The same rule is applicable to a determination of the zoning board of appeals with reference to a special use under the ordinance before us.

Under the terms of the controlling ordinance the board, before it could grant a special use, must find that it was necessary for the public convenience. Such a directive necessarily involves the exercise of a broad

discretion on the part of the board of appeals. The term "public convenience" is far from being an absolute, and when "public convenience" is referred to it does not mean that one or more persons may be benefited at a particular locality, but it means the public generally, and in determining the true public convenience the effect of the order upon the whole public should be taken into consideration. I. C. R.R. Co. v. Commerce Com., 397 Ill. 387, 395, 74 N.E.2d 526, 530. The board must weigh the benefit which would result from such a special use against the inconvenience and damage which might be caused to persons living in the immediate vicinity.

The question as to the amount of relief which would be given to the general neighborhood parking situation if the special use was granted was left unresolved. The bad parking conditions in the neighborhood were said to be temporary and that there would be relief when Edens Highway was extended toward Addison or Belmont, and in fact the one disinterested witness of the plaintiff, who stated that he was chairman of the Irving Elston Chamber of Commerce, testified that in his opinion the establishment of the proposed parking lot would help the parking situation very little. The evidence was far from conclusive. In the proper exercise of its discretion, from the evidence presented to it, the zoning board of appeals could reasonably conclude that the plaintiff had not adequately proved that the parking lot was necessary for the public convenience at that location. Under those circumstances we cannot say that the zoning board of

appeals abused its discretion or that its findings were against the manifest weight of the evidence.

The judgment order of the Circuit Court is affirmed.

Affirmed.

Dempsey and Schwartz, JJ., concur.

Abstract only.

A

48308

In the Matter of the Estate of KATHRYN M. PROMINSKI, Deceased	
GERTRUDE GLOWSKI, Executor of the Will of KATHRYN M. PROMINSKI, Deceased, and JOHN V. RYAN, Attorney for said Executor, Appellants,	APPEAL FROM PROBATE COURT COOK COUNTY
v.	
MARGARET ANN PROMINSKI, sole heir, legatee and devisee of KATHRYN M. PROMINSKI, Deceased, Appellee.	

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

Gertrude Glowski (hereafter referred to as executor) was the executor of the will of Kathryn M. Prominski, deceased. The sole beneficiary of the estate under the will was Margaret Ann Prominski (hereafter referred to as the beneficiary). An order was entered in the Probate Court of Cook County awarding and allowing certain fees to the attorney for the executor of the estate. This appeal is taken from that order.

Dr. Alexander J. Prominski died intestate June 22, 1950. The administrator of that estate was Kathryn M. Prominski, his wife, who died testate August 24, 1955. Letters testamentary in the instant estate of Kathryn M. Prominski were issued out of the Probate Court to Gertrude Glowski, executor of her will. John V. Ryan was engaged as attorney for the estate. The estate of Dr. Prominski at that time was still open and no inventory had been filed. Mrs. Prominski had been sick and for some seven years prior

to her death had neglected her personal business affairs. Mr. Ryan spent considerable time in analyzing and compiling data from decedent's papers, records and various documents at her home. Among the papers he discovered a number of promissory notes, on five of which he instituted court action. There had been a mechanic's lien foreclosure action brought on two parcels of real estate owned by the decedent which had proceeded to a master's sale. Mr. Ryan also proceeded to take the necessary steps to make redemption from the master's sale. The decedent owned certain property in La Porte County, Indiana, on which ancillary administration proceedings were instituted. Sometime in 1954 or 1955 Mr. Ryan, while conferring with the executor and the beneficiary in the course of checking over certain of the decedent's papers and documents, discovered an envelope postmarked March 22, 1951, addressed to Dr. Prominski, containing a pamphlet report to the shareholders of the Community Telephone Company for the year 1950. Mr. Ryan commenced an investigation to determine whether or not there was any Community Telephone Company stock which could be considered as an asset of the estate. Neither the executor nor the beneficiary could give any information. The attorney representing the estate of Dr. Prominski informed him that shortly after the estate had been opened a man had come to the attorney and had made a nominal offer of a few dollars per share for the stock and he said that Dr. Prominski was listed on the company's books as a stockholder. The attorney consulted with Mrs. Prominski, the administrator of that estate, and she said that she thought the stock might be lying about

the house somewhere. At that time Mrs. Prominski was in very bad health and the attorney could not press the matter with reference to the discovery of the stock. Mr. Ryan contacted the City National Bank, which he had learned was the depositary for the liquidated value of the stock. The bank informed Mr. Ryan that the Community Telephone Company had been sold and that there was on deposit in the bank $86,041.62 to be paid to the holder of the 700 shares of the Community Telephone Company listed in the name of Dr. Prominski. Finally, at the urging of the attorney, the executor discovered the shares of stock in an old metal file and gave them to Mr. Ryan, and the bank paid over the said sum of money to the estate about March 1957. During the same month Mr. Ryan had a conference with the executor and the beneficiary. At that conference Mr. Ryan fixed his total fee at $17,500, to which fee both the beneficiary and the executor agreed. Subsequently $17,000 was paid to the attorney. The attorney then filed a federal estate tax return, taking the valuation of the stock one year from the date of death of the testator and fixing the value at $60,000, which method was approved, and on February 8, 1960 the United States internal revenue department refunded a tax deposit overage.

On or about December 17, 1959, while the estate was still open, the beneficiary engaged attorneys to enter her appearance in the estate proceedings in the Probate Court. On December 17, 1959, on motion of the beneficiary, an order was entered in the Probate Court for the executor to file an accounting to date. After the account was filed the benefi-

ciary filed written objections to the amount of the attorney's fees. The court entered an order that Mr. Ryan file his petition for fees, to which the beneficiary filed her answer objecting to the request of the attorney for a fee of $17,500. A hearing was had before an acting judge of the Probate Court.

Mr. Ryan, the executor, the beneficiary and four attorneys testified; two of the attorneys testified as experts in support of the attorney's claim for fees, two against it. The attorney for the estate of Dr. Prominski also testified.

Mr. Ryan, as a part of his sworn petition for fees, filed a schedule showing that he had spent 375-1/2 hours, with 31-1/2 hours allotted to court time handling the estate. At the hearing it was agreed by the parties that the gross value of the estate for fee purposes was $145,000.

One of the attorneys in opposition to the Ryan claim testified, basing his testimony on the scheduled rates of the Chicago Bar Association for ordinary work in connection with probating an estate, that the fee would be $5,418 and that the customary hourly rate charged by attorneys for services rendered in probating estates in Cook County, Illinois was $20 to $25 an hour, and $30 for court work. The other attorney testifying stated that the reasonable fee for services rendered in the estate proceedings would be between $7,500 and $8,000.

One of the attorneys testifying in behalf of Ryan stated that the fee of $17,500 was a reasonable fee and that $35 an hour could be considered a reasonable charge, and

that on that basis the fee, computed on time alone, would be $12,000 or $13,000 with an additional allowance for the extraordinary services rendered. The other attorney testified that considering the results obtained in the determination of the federal estate tax, together with the efforts made in the recovery of the telephone stock certificates, a reasonable fee would be between $18,000 and $20,000. Mr. Ryan claimed that he had saved the estate some $13,000 and stated that the federal estate tax situation was very unusual.

The court entered an order fixing the attorney's fees at $12,000 for all services rendered and to be rendered in the estate, and sustaining the beneficiary's objections to the current account as to all attorney's fees in excess of $12,000. This appeal is taken from that order by the executor and John V. Ryan, attorney for the executor.

The first attorney who testified in behalf of the beneficiary had stated that his fee estimate was fixed on a minimal estate, that is, the minimum fee that would be charged in an estate where there is a minimum amount of work to be done; that if the attorney had many conferences with his clients at their home and had filed numerous lawsuits for the estate this would be out of the ordinary; and that where the attorney discovers by his visits to the decedent's home that there was a memorandum indicating a possible security asset and through that discovery is able to locate certificates of stock that the memorandum pertains to and in so doing recovers a large amount for the estate, this would go beyond the ordinary attorney's work in probating an estate and would be out of

the ordinary. The second attorney testifying in behalf of the beneficiary stated that he believed that Ryan would be entitled to additional compensation for work which he did in connection with the estate.

The final report in the estate of Dr. Prominski was filed January 3, 1957, and with that report was filed a copy of an inventory in that estate. The inventory had been prepared in 1952. For seven years following the death of Dr. Prominski there had been no discovery made of the telephone shares herein involved, and the inventory in the estate of Dr. Prominski gave the value of the shares as $4,200. After the matter had been brought to the attention of Mr. Ryan he found that there was on deposit a sum of money in excess of $86,000 which would be paid out when and if the certificates for the shares which had been purchased by Dr. Prominski were presented to the bank for cancellation. The executor and the beneficiary were unable to find the certificates and Mr. Ryan worked out a plan by which suits might be filed in Chicago and New York seeking a decree to find ownership in the executor, and in the preparation of the suits he had obtained a surety company bond in the sum of $172,000 to be filed at the time when the suits were commenced. After the stock certificates were discovered the bond was cancelled. It seems clear to us from the evidence in the record that the efforts of Mr. Ryan were the efficient cause of the finding of the stock by the executor. The finding of the stock brought into the estate the sum of $86,041.62 without any further litigation.

In In re Estate of James, 10 Ill. App.2d 232, 134

N.E.2d 638, the court states that a court is not bound to accept the opinions of witnesses with reference to attorney's fees as being conclusive, and cites Gentleman v. Sanitary Dist. of Chicago, 260 Ill. 317, 103 N.E. 234; Goodwillie v. Milliman, 56 Ill. 523; and Matheny v. Bohn, 164 Ill. 495, 45 N.E. 1011. The opinions of witnesses and evidence of the sum usually charged and paid for such services should, of course, be considered; but the courts are well qualified to form an independent judgment on such questions and it is their duty to do so. Also see In re Estate of Hoyman, 27 Ill. App.2d 438, 170 N.E.2d 25. In Presbyterian Dist. Service v. Chgo Nat. Bank, 28 Ill. App.2d 147, 171 N.E.2d 86, we said:

> "It is a familiar rule that a reviewing court may apply its own independent judgment in considering the question of the propriety of attorney's fees. Lee v. Lomax, 219 Ill. 218, 76 N. E. 377; Metheny v. Bohn, 164 Ill. 495, 45 N. E. 1011; In re Estate of Hoyman, Gen. No. 48030, opinion filed October 19, 1960 [27 Ill. App.2d 438]; In re Estate of James, 10 Ill. App.2d 232, 134 N.E.2d 638; Gilbert v. Lloyd, 170 Ill. App. 436."

In her brief the beneficiary makes the following statement: "Accordingly, taking the sworn petition for attorney's fees at its face value and if the usual and customary rate of $25 per hour for office or similar work and $30 per hour for court work is employed, the reasonable fee allowed in this estate would amount to $9,560 based on 344 hours of office work and 31-1/2 hours of court work." That figure is based upon the ordinary estate probated in Cook County and no allowance is made for any services out of the ordinary rendered by the attorney for the estate. Neither is any allowance made for the additioanl work to be done by the attorney in filing the

final account and taking such other steps as are necessary to close the estate, all of which is covered in the fee allowed by the court.

The sum of $9,560 is considered by the beneficiary to be the basic amount which could properly be allowed to the attorney purely on an hourly basis for services rendered up to the time of the filing of the petition for fees. As we have pointed out, Mr. Ryan was a catalyst in the discovery of the telephone stock certificates. The discovery of those certificates resulted in a substantial aggrandizement of the estate without any additional litigation. The Probate Court in allowing a fee of $12,000 undoubtedly took into consideration the fact that additional work must be rendered by the attorney in order to close the estate and that some compensation should be paid for services out of the ordinary which were rendered by the attorney. As was said in In re Estate of James, supra:

> "We agree that the doctrine of stare decisis is a substantial and fundamental part of our law, but the difficulty lies in determining what is stare decisis in cases of this kind. There are many cases in our Supreme and Appellate Courts determining the reasonableness of fees, but each case had its own peculiar facts and circumstances, and what would be reasonable in one could be unreasonable in another. Each case must rest on its own facts and circumstances and no hard and fast rule can be or has been laid down in determining what would be a reasonable attorney fee in each individual case."

It is our considered judgment that the work performed by Mr. Ryan, considering the exceptional character of the estate and the results obtained, would entitle him to a fee of $15,000 for services rendered and to be rendered in the estate.

The order of the Probate Court of Cook County

finding the fair and reasonable value of all services rendered and to be rendered by John V. Ryan as attorney for the executor, for the complete probate of the estate, to be the sum of $12,000 and sustaining objections to the current account as to attorney's fees claimed as a credit in said current account in excess of said sum of $12,000 is reversed, and the cause is remanded with directions to the Probate Court to enter an order, in accordance with this opinion, finding that the fair and reasonable value of all services rendered and to be rendered by John V. Ryan, as attorney for the executor, for the complete probate of the estate, is the sum of $15,000 and sustaining the objections of the beneficiary to the allowance of any credit to the executor in her current account for any amount as attorney's fees in excess of $15,000.

Reversed and remanded with directions.

Dempsey and Schwartz, JJ., concur.

Abstract only.

48397

OSCAR GALTER,	)	
Plaintiff-Appellant,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
GREGORY KORZENIEWSKI, d/b/a/ DEPENDABLE PRODUCTS CO.,	)	OF CHICAGO
Defendant-Appellee.	)	

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On April 8, 1957, Oscar Galter sued Gregory Korzeniewski for damages of $251.02 because of the alleged negligent performance of a contract. In a second count filed later he asked judgment for the additional sum of $79.30. Defendant denied the allegations of negligence. A trial without a jury resulted in a judgment against plaintiff, who appeals.

The contract dated May 1, 1956, provided that defendant furnish and install a lawn sprinkling system on plaintiff's premises at 6545 N. Kilpatrick Ave., Skokie, for $1200 in accordance with specifications and a drawing. It contained a guarantee against defects in material and workmanship for two years from installation. Plaintiff does not base his action on this clause but upon the charge of negligent performance, and that the system installed was "insufficient, inadequate and defective in many particulars." Plaintiff testified that immediately after the system went into operation there were leaking sprinkler heads, other heads did not throw water, the sprinkler heads were not spaced to cover all the lawn, and a timer did not work properly; that "frost protection was lacking in that various underground pipes froze, causing leaks."

Plaintiff further testified that he contacted Everhot Products Company, engaged in the business of making repairs to sprinkler systems, which did "certain work" in the amount of $251.02. The court sustained objection to the introduction of a canceled check of plaintiff for $251.02 payable to Everhot Products Company. The objection was sustained on the ground that the best evidence of the repair work would be the repair bill. Plaintiff continuing his testimony said that the sprinkler system worked "fairly well" after the repair work had been done. He testified about a bill for $79.30 "representing additional repair work done approximately three years after the installation of the original system." The court sustained an objection to the introduction of the bill for $79.30. On cross-examination plaintiff said that a "portion of the lawn had been dug up for a stone patio"; that he had approved a diagram placing sprinkler heads in the locations where defendant placed them; that defendant made adjustments at plaintiff's request "shortly after the system had become operative"; that defendant made two calls for repairs, "once to repair a sprinkler head damaged by a lawn mower"; and that the sprinklers sprayed water against his windows when the wind blew hard in that direction. Plaintiff called George Wellek, a supervisor of Everhot Products Company, apparently to corroborate his testimony. Wellek stated that he remembered having done repair work for plaintiff but could not recall the nature of the work. To a hypothetical question as to his opinion of the quality of the original installation of the sprinkler system, he replied that he could

not "make a statement one way or the other." On cross-examination, the witness testified that he "seemed to recall doing additional work for plaintiff over and above the then installed system." Defendant offered a diagram of plaintiff's lawn which defendant said represented the "exact plan utilized by him in installing the system for plaintiff, and which had been approved by plaintiff." Defendant testified further that he had been in the business of installing sprinkler systems for "some years"; that when he came out to observe the operation of the system after installation he noted that "a portion of the lawn had been dug up, apparently for a stone patio, and that a sprinkler head had been sheared off, presumably by a lawn mower." The objection by plaintiff to the statement regarding the missing sprinkler head was sustained. Defendant testified that in his opinion the system was operating in accordance with the specifications agreed upon by the parties. In answer to an inquiry whether it was unusual for underground lawn sprinklers to throw water against a window of a house, the witness stated that "this was unusual but that plaintiff had approved the diagram and plans submitted by him." In answer to an inquiry about the use of plastic and other materials for pipe fittings, "and whether leaks and separations of said fittings would be likely due to the difference in materials used," defendant "indicated that plaintiff had requested copper and plastic pipes and fittings, and that small leaks were likely."

The burden was on plaintiff to prove that the defendant failed to perform the contract in a good and workmanlike manner. This was the real issue in the case. His testimony

on the material points is contradicted by the defendant. A witness called to corroborate plaintiff's testimony had no recollection of the repair work and could not make a statement as to the quality of the installation. The defendant's position at the trial was that the system was operating in accordance with the specifications agreed upon by the parties. In this state of the record we cannot say that the trial judge erred in ruling that plaintiff failed to prove his case by a preponderance of the evidence. It follows that the finding was not against the manifest weight of the evidence.

The testimony of plaintiff that he contacted the Everhot Products Company, which did the repair work in the amount of $251.02, is not contradicted. In objecting to the introduction of the check, the defendant suggested that the best evidence of the repair work would be the paid repair bill. See Cloyes v. Plaatje, 231 Ill. App. 183, 190; and Byalos v. Matheson, 328 Ill. 269, 272. Plaintiff was not harmed by the court's refusal to receive the check as an exhibit. The check would evidence payment but would not tend to show the work done and the materials used. Plaintiff's witness Wellek testified that he "seemed to recollect doing additional work for plaintiff over and above the repair of the then installed system," presumably the "later repair work."

The judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND, P.J., and
BRYANT, J., Concur.

48178

CHARLES NOEL, Appellant,	)	APPEAL FROM THE
v.	)	MUNICIPAL COURT
JONATHAN HALE, Appellee.	)	OF CHICAGO.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff, Charles Noel, appeals from a $500 verdict and judgment in his favor in his tort action, on the ground that the damages awarded are so grossly inadequate as to be against the manifest weight of the evidence.

There is no dispute as to the occurrence. On January 29, 1957, an automobile being driven by plaintiff was struck from behind by an automobile driven by defendant. At the trial defendant presented no evidence. The evidence for plaintiff consisted of testimony by plaintiff and his attending physician.

As to plaintiff's property damage, he testified that his automobile was damaged, and because the repair estimates exceeded the value of the automobile, he gave it to his father. No evidence was introduced as to the year, make or model of plaintiff's automobile or as to the parts damaged or the repair estimates.

As to his physical injuries, plaintiff testified that the impact of the collision caused him to bump up against the steering wheel and jerked him backward, resulting in painful injuries. The next day he was examined by a doctor, who took x-rays, gave him heat treatments, a prescription for pills, and prescribed therapy and massage treatments. He saw the doctor seven or eight times and received massage and heat treatments. He lost four actual working days and was not able to resume his regular duties until about two weeks after the occurrence. His doctor bill was $162 and his lost pay amounted to $104. At the time of the accident and at the time of the trial, plaintiff was employed as a mason for a steel company in tearing down and rebuilding furnaces. He was in good health prior to the collision and still has trouble with his back and neck, "just very rarely."

Plaintiff's attending physician testified that he examined plaintiff on January 30, 1957, at which time plaintiff complained of pain and limitation of motion of the neck and pain in the upper back between the shoulder blades. X-rays were normal, and he diagnosed plaintiff's injuries as a sprain in the upper dorsal area between the shoulder blades. Treatments consisted of heat, hot pads and neck massage. These treatments were given on six or more occasions from February 1 to February 25, 1957, when plaintiff was discharged with a spastic neck, although motion was within the range of normal.

Plaintiff contends that an award of $500 for the total loss of his automobile and his injuries is manifestly against the weight of the evidence and palpably inadequate, and that he did not receive substantial justice.

In matters relating to damages, the courts are reluctant to interfere with the discretion of the jury as to the amount of damages to be awarded and ordinarily will not overturn the jury's finding for inadequacy, unless the award is palpably inadequate or against the manifest weight of the evidence. (15 I.L.P., Damages, §162.) To be against the manifest weight of the evidence requires that an opposite conclusion be clearly evident. (Arboit v. Gateway Transportation Co. (1958), 15 Ill. App.2d 500, 507.) Where no complaint is made as to instructions to the jury or the admissibility or rejection of evidence, the reviewing court will not disturb the amount of the damages unless the damages are so palpably inadequate as to require reversal. McSee v. Chicago Motor Coach Co. (1950), 342 Ill. App. 238.

As to the property damage, plaintiff's evidence included nothing from which the jury could measure damages. Where an automobile is damaged beyond repair, the measure of damage is the fair cash market value of the automobile at the time of the collision less the fair cash market value of the salvage thereof. Bouton v. Harrison (1942), 317 Ill. App. 152; 15 I.L.P., Damages, §144.

As to plaintiff's injuries, his doctor bill was $162 and his lost pay was $104, or a total of $266. There is no medical testimony suggesting any permanent injury to plaintiff, and he, in effect, admitted to a complete recovery, except that on very rare occasions he has trouble with his back and neck. The evidence relating to plaintiff's injury, even though not controverted, is not sufficient to warrant a conclusion that the verdict is grossly unfair and unreasonable, or that the jury acted from passion or prejudice or any other motive, nor are the damages awarded so palpably inadequate as to require a reversal.

Plaintiff makes the further contention that the remarks of counsel for the defendant in the final argument, in which he referred to the jury's need to consider how long it would take the defendant to pay any verdict they would award, were improper and unduly influenced and prejudiced the jury against the plaintiff. We believe the remarks were improper, but doubt they affected the verdict. It was of no consequence to the jury as to how long it would take the defendant to pay any verdict they would award. In any event, no objection was made to these remarks, and the court was not called upon to make any ruling in this regard. Therefore, the propriety of the remarks is not before this court for review. "Parties cannot complain of alleged improper remarks to the jury where they make no objection

thereto." City of Chicago v. Vaccarro (1951), 408 Ill. 587, 600; Dept. of Public Works v. Anastoplo (1958), 14 Ill.2d 216, 223; County of Cook v. Colonial Oil Corp. (1958), 15 Ill.2d 67, 75.

The extent of damages is peculiarly one of fact for the jury. We find no convincing reason for disturbing the verdict and judgment. Therefore, the judgment is affirmed.

AFFIRMED.

BURMAN AND ENGLISH, JJ., CONCUR.

ABSTRACT ONLY.

Abs-V33 #4

General No. 11567 Agenda No. 14

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

October Term, 1961

BOARD OF EDUCATION OF LIBERTYVILLE-FREMONT CONSOLIDATED HIGH SCHOOL DISTRICT NUMBER 120 OF LAKE COUNTY, ILLINOIS, Plaintiff-Appellant,	Appeal from the
vs.	Circuit Court of
COUNTY BOARD OF SCHOOL TRUSTEES OF LAKE COUNTY, ILLINOIS; LAKE FOREST COMMUNITY HIGH SCHOOL DISTRICT NUMBER 115, LAKE COUNTY, ILLINOIS and DONALD W. HINTZ, et al., Defendants-Appellees.	Lake County, Illinois

DOVE, P.J.

County Board of School Trustees of Lake County, Illinois entered an order on November 16, 1959 granting the prayer of a petition detaching a certain tract of land from the Libertyville-Fremont Consolidated High School District No. 120 of Lake County, Illinois and annexing it to Lake Forest Community High School District No. 115, Lake County, Illinois. Libertyville-Fremont District sought a review of this order under the Administrative Review Act of this State. (Ill. Rev. Stat. 1959, chap. 110, par. 264 et seq). The circuit court of Lake County affirmed the order granting the detachment and defendant, Libertyville-Fremont District appeals.

General No. 11,927 — Agenda No. 14

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST ADDITION

October Term, 1961

FILED

JAN 16 1962

PAUL V. WUNDER
Clerk Appellate Court Second District

BOARD OF EDUCATION OF LIBERTYVILLE - FREMONT COMMUNITY HIGH SCHOOL DISTRICT NUMBER 120 OF LAKE COUNTY, ILLINOIS,	
Plaintiff-appellant,	Appeal from the
vs.	Circuit Court of
COUNTY BOARD OF SCHOOL TRUSTEES OF LAKE COUNTY, ILLINOIS; LAKE COUNTY COMMUNITY HIGH SCHOOL DISTRICT NUMBER 115, LAKE COUNTY, ILLINOIS and DONALD E. HINT, et al.,	Lake County, Illinois
Defendants-appellees.	

MOW, J.U.

County Board of School Trustees of Lake County, Illinois entered an order on November 16, 1959 granting the prayer of a petition detaching a certain tract of land from the Libertyville-Fremont Community High School District No. 120 of Lake County, Illinois and annexing it to Lake Forest Community High School District No. 115, Lake County, Illinois. Libertyville-Fremont District sought a review of this order under the Administrative Review Act of this state. (Ill. Rev. Stat. 1959, chap. 110, par. 264 et seq). The circuit court of Lake County affirmed the order granting the detachment and defendant, Libertyville-Fremont District appeals.

The record discloses that the territory which is the subject matter of this proceeding is known as Forest Knoll Estates consisting of a 40 acre tract which has been subdivided into 60 lots and there are 23 residences located on them and more homes are being built from time to time. In 1953, the County Board of School Trustees detached the Forest Knoll Estates subdivision from the Oak Grove Grade School District No. 68 where it was then located and annexed it to the Lake Bluff Grade School District.

In the Forest Knoll Estates Subdivision there were 34 children living at the time of the filing of the petition for the detachment. Eighteen of these were under the age of 6, fifteen were between the ages of 6 and 13, and there was one child 14 years of age. Seventeen of these children attended the Lake Bluff Grade School, which is in the Lake Forest High School District, and one child attended the Libertyville High School. The total assessed valuation of all the property located in the Forest Knoll Subdivision for the year 1959 was $243,405.00. The taxes received from this subdivision by the Libertyville-Fremont District amounted to $3,486.00 for that year. The cost per capita to educate each student in the Libertyville-Fremont District was $525.00 per year.

From the Forest Knoll Subdivision to the Lake Forest High School is a distance of three and one-half miles, and from this subdivision to the Libertyville-Fremont High School was estimated by different witnesses to be from four and one-half miles to seven miles. Lake Bluff is the community, civic, and social center for the Forest Knoll Estates Subdivision as well as the shopping center. The children who live in the area immediately to the East and South of this subdivision attend the Lake Forest High School and the children living in the subdivision play and visit with the children attending the Lake Forest High School.

The record discloses that the territory which is the subject matter of this proceeding is known as Forest Hill Estates consisting of a 40 acre tract which has been subdivided into 40 lots and there are 23 residences located on them and more homes are being built from time to time. In 1959, the County Board of School Trustees detached the Forest Hill Estates subdivision from the Oak Grove School District No. 65 where it was then located and annexed it to the Lake Bluff Grade School District.

In the Forest Hill Estates subdivision there were 34 children living at the time of the filing of the petition for the detachment. Eighteen of these were under the age of 6, fifteen were between the ages of 6 and 12, and there was one child 14 years of age. Seventeen of these children attended the Lake Bluff Grade School, which is in the Lake Forest High School District, and one child attended the Libertyville High School. The total assessed valuation of all the property located in the Forest Hill subdivision for the year 1959 was $[illegible],[illegible]5.00. The taxes received from this subdivision by the Libertyville-Fremont District amounted to $[illegible],[illegible]0.00 for that year. The cost per capita to educate each student in the Libertyville-Fremont District was $[illegible]22.00 per year.

From the Forest Hill subdivision to the Lake Forest High School is a distance of three and one-half miles, and from this subdivision to the Libertyville-Fremont High School was estimated by different witnesses to be from four and one-half miles to seven miles. Lake Bluff is the community, civic, and social center for the Forest Hill Estates subdivision as well as the shopping center. The children who live in the area immediately to the East and South of this subdivision attend the Lake Forest High School and the children living in the subdivision play and visit with the children attending the Lake Forest High School.

Both the Libertyville and Lake Forest High School Districts are fully accredited and offer recognized four-year high school courses of substantially the same character. There were thirty-four signatures to the petition for detachment. Some of the signers of the petition for detachment testified that they wanted their children to go to the Lake Forest High School because they were already acquainted with the children going to that school and that these children of the Lake Forest School were very friendly with their children since they lived so close together but were practically strangers to the students attending the Libertyville-Fremont High School.

The 1957 assessed valuation of the Libertyville-Fremont High School District was $82,296,980.00. Its total tax rate was .4981 with a total taxable wealth for each pupil in the district of $78,058.00. The assessed valuation of the Lake Forest District for 1957 was $96,185,935.00. Its total tax rate was .568 with the taxable wealth for each student being $173,495.00. The Libertyville-Fremont District had an enrollment of 1259 and a teaching staff of 61. The enrollment in the Lake Forest District was 660 with a faculty of 40. Hot lunches were available in both districts as was bus transportation.

It is insisted by counsel for appellant that the order of the County Board of School Trustees granting the prayer of the petition for detachment was not sustained by the evidence and was against the manifest weight of the evidence. The Lake Forest Community High School District asserts that the order of the County Board of School Trustees was amply sustained by the evidence and that the School Trustees acted well within the limits of the discretion given to them by the provisions of the School code and that the Circuit Court committed no error in affirming the order of the County Board of School Trustees.

Both the Libertyville and Lake Forest High School districts are fully accredited and offer recognized four-year high school courses of substantially the same character. There were thirty-four signatures to the petition for detachment. Some of the signers of the petition for detachment testified that they wanted their children to go to the Lake Forest High School because they were already acquainted with the children going to that school and that these children of the Lake Forest School were very friendly with their children since they lived so close together but were practically strangers to the students attending the Libertyville-Fremont high school.

The 1937 assessed valuation of the Libertyville-Fremont High School district was $[illegible],[illegible],[illegible]. Its total tax rate was .[illegible] with a total taxable wealth for each pupil in the district of $[illegible]. The assessed valuation of the Lake Forest District for 1937 was $[illegible]. Its total tax rate was .[illegible] with the taxable wealth for each student being $[illegible]. The Libertyville-Fremont district had an enrollment of 1259 and a teaching staff of [illegible]. The enrollment in the Lake Forest District was [illegible] with a faculty of [illegible]. Hot lunches were available in both districts as was bus transportation.

It is insisted by counsel for appellant that the order of the County Board of School Trustees granting the prayer of the petition for detachment was not sustained by the evidence and was against the manifest weight of the evidence. The Lake Forest Community High School District asserts that the order of the County Board of School Trustees was amply sustained by the evidence and that the Board Trustees acted well within the limits of the discretion given to them by the provisions of the School code and that this Circuit Court committed no error in affirming the order of the County Board of School Trustees.

In Kinney vs. County Board of School Trustees, 7 Ill. App. 2d, 286 at page 289 it is said: "The changing of boundaries of a school district is a legislative act, and in performing this function the County Board of School Trustees is acting as an agent of the legislature. Sec. 1, Article VIII, Constitution of Illinois, 1870; chap. 122, par. 4 B-1 et seq., Ill. Rev. Stat. 1953; People v. Deatherage, 401 Ill. 25, Husser vs. Fouth,, 386 Ill. 188. The findings of an administrative agency are deemed to be prima facie correct and the court is not authorized or privileged to substitute its judgment for that of the agency unless the findings of the agency are not supported by substantial evidence. Produce Terminal Corp. v. Illinois Commerce Commission ex rel. Peoples Gas Light & Coke Co., 414 Ill. 582; Department of Public Works & Bldgs. vs. Lewis, 411 Ill. 242; Mohler vs. Department of Labor, 409 Ill. 79; People ex rel. Loughry vs. Board of Education of Chicago, 342 Ill. App. 610. This is particularly true where the administrative body is vested with discretion in making a determination. Smith v. Board of Education of Oswego Community High School Dist., 405 Ill. 143; People ex rel. Loughry v. Board of Education of Chicago, supra".

The trustees in the instant case were familiar with the local problems and the conditions present. They could evaluate the numerous problems involved in a detachment proceeding and they understood better than anyone else the local conditions with which the instant school districts were confronted. (School Directors ~~Districtors~~ of District No. 82 v. County Board, 15 Ill. App. 2d 115, 119; Community Unit School District v. County Board of School Trustees, 9 Ill. App. 2d 116, 127.)

In Kinney vs. County Board of School Trustees, 7 Ill. App. 3d, 286 at page 289 it is said: "The obligation of boundaries of a school district is a legislative act, and in performing this function the County Board of School Trustees is acting as an agent of the Legislature. See. 1, Article VIII, Constitution of Illinois, 1870; chap. 122, par. 3-1 et seq., Ill. Rev. Stat. 1971; People v. Deatherage, 407 Ill. 45, Hueser vs. Fouth, 386 Ill. 160. The findings of an administrative agency are deemed to be prima facie correct and the court is not authorized or privileged to substitute its judgment for that of the agency unless the findings of the agency are not supported by substantial evidence. Produce Terminal Corp. v. Illinois Commerce Commission ex rel. People's Gas Light & Coke Co., 411 Ill. 520; Department of Public Works & Bridge. vs. Lewis, 411 Ill. 370; Lorier vs. Department of Labor, 409 Ill. 79; People ex rel. Dougherty vs. Board of Education of Chicago, 342 Ill. 4pp. 610. This is particularly true where the administrative body is vested with discretion in making a determination. Smith v. Board of Education of Chicago Community High School Dist., 415 Ill. 182; People ex rel. Dougherty v. Board of Education of Chicago, supra".

The trustees in the instant case were familiar with the local problems and the conditions present. They could evaluate the numerous problems involved in a detachment proceeding and they understood better than anyone else the local conditions with which the instant school districts were confronted. (School Directors of District No. 90 v. County Board, 12 Ill. App. 3d 112; Community Unit School District v. County Board of School Trustees, 9 Ill. App. 3d 116, 121.)

The only reason disclosed by this record that might be adverse to the granting of the petition for detachment is that the Libertyville-Fremont District will lose some $3,486.00 in tax revenue each year. However, the loss of tax revenue where a territory is detached always occurs. One district loses and the other gains. The legislature fully understood this when it provided for changes in school boundaries. Loss of revenue standing by itself and especially where it will not materially affect the financial status of the losing district, as is the case here, is no reason for denying the right of detachment. (Stehl vs. County Board of School Trustees, 7 Ill. App. 2d 257, 266.)

The record before us shows that the children residing in the territory detached attend the Lake Bluff Grade School and that this grade school is in the Lake Forest High School District. The parents desire that their children attend the high school which is located in the same territory as is the grade school. The legislature of this state has expressed a similar desire, as is disclosed by the School Code, (Ill. Rev. Stat., 1959, chap. 122, sec. 4B-3). It is there provided that in the disposition of the territory of a dissolved school district the County Board of School Trustees should, unless it is impossible, annex the territory of the district to a continguous elementary district whose eighth grade graduates customarily attend the high school in that territory. In this case, the geographical and natural identification of the area detached is in the Lake Bluff Grade School District which is in the Lake Forest High School District. The educational facilities in both districts are substantially the same, although in the Libertyville-Fremont District there are twenty-one students per teacher while in the Lake Forest District there are only sixteen. Lake Forest appears to be in a better financial condition to assume the cost of educating the children from the area in question than does the Libertyville-Fremont District as

The only reason discovered by this court that might be adverse to the granting of the petition for detachment is that the Lebanonville-Fremont District will lose some $[illegible]$ in the revenue each year. However, the loss of the revenue where a territory is detached always occurs. The district loses and the other gains. The Legislature fully understood this when it provided for changes in school boundaries. Loss of revenue affecting by itself and necessarily more it will not materially affect the financial status of the Lebanon district, as is the case here, is no reason for denying the right of detachment. (State ex. County Board of School Trustees, 2 Ill. App. 2d 292, 296.)

The record before us shows that the children residing in the territory detached attend the Lake Forest Township School and that this grade school is in the Lake Forest High School District. The petition indicates that their children attend the high school which is located in the same territory as in the grade school. The Legislature in this state has approved a similar policy, as is disclosed by the School Code, (Ill. Rev. Stat., 1957, ch. 122, sec. 22-3). It is there provided that if the detachment of the territory of a non-high school district the County Board of School Trustees should, where it is impossible, annex the territory of the district to a contiguous elementary district where eighth grade graduates customarily attend the high school in that territory. In this case, the petitioners and petitioners' children live in the area detached in the Lake Forest Grade School District which is in the Lake Forest High School District. The educational facilities in both districts are wonderfully the same. Although in the Lebanonville-Fremont district there are twenty-one students per teacher while in the Lake Forest District there are only sixteen. Lake Forest appears to be in a better financial condition to assume the cost of educating the children from the area in question than does the Lebanonville-Fremont District as

indicated by the financial figures hereinabove set forth.

The evidence reveals that there is a very strong personal preference among the parents of the children residing in the area detached that their children attend the Lake Forest High School. This is because of the distance factor, the natural identification of the area with Lake Bluff and Lake Forest, the friendliness of the students residing in the area adjacent to Forest Knoll Estates to their children, and the fact that Lake Bluff is the community, social, and civic center of the territory as well as its shopping center. These personal preferences, while not controlling, are entitled to consideration, and where all other factors are equal, are very persuasive. (Burnidge vs. School Trustees of Kane County, 25 Ill. App. 2d 503.)

We have reviewed this record in the light of appellant's contention that the decision of the County Board of School Trustees is not supported by any evidence or, is contrary to the manifest weight of the evidence. There is ample evidence in this record to sustain the order of the County Board of School Trustees and the judgment of the Circuit Court of Lake County sustaining that order is affirmed.

Judgment affirmed.

SMITH, J. CONCURS.

McNEAL, J. CONCURS.

indicated by the fluvial figure Mercklove set forth.

The evidence reveals that there is a very strong personal preference among the people of the children residing in the area that other children attend the Lake Forest High School. This is because of the distance factor, the natural identification of the area with Lake Forest and Lake Forest, the familiarity of the students residing in the area adjacent to Lake Forest with their classmates in the area, and the fact that Lake Forest is the community, social, and civic center of the township as well as the shopping center. These personal preferences, while not controlling, are entitled to consideration, and where all other factors are equal, are very persuasive. (Murphy v. Board of Trustees of Lake County, 75 Ill. App. 2d 267).

We have considered this evidence in the light of appellant's contention that the isolation of the Lake Forest Grade School District is not justified by any criterion or, in contrary to the public's welfare of the children. There is ample evidence in this record to support the order of the County Board of School Trustees and the judgment of the Circuit Court of Lake County sustaining that order in affirmed.

Judgment affirmed.

WITH, J. concurs.

McGLOON, J. concurs.

48395

JOSEPH J. BRANDES and SCHWARZBACH and PRESTON, Plaintiffs, Appellees, v. ILLINOIS PROTESTANT CHILDREN'S HOME, INC., a Corporation not for Profit, and FLORENCE J. BUDD, Defendants, Appellants	APPEAL FROM MUNICIPAL COURT OF CHICAGO
ILLINOIS PROTESTANT CHILDREN'S HOME, INC., a Corporation not for Profit, and FLORENCE J. BUDD, Counterplaintiffs, Appellants v. SCHWARZBACH and PRESTON, Counterdefendants, Appellees.	

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This appeal was taken from an order of the Municipal Court of Chicago entered on December 6, 1960 refusing to vacate a judgment entered in favor of Joseph J. Brandes against the Illinois Protestant Children's Home, Inc. (hereafter referred to as the "Home") and Florence J. Budd, and refusing to vacate the dismissal of a counterclaim filed by the Home and Budd against Schwarzbach and Preston. The judgment entered in favor of Brandes against the Home and Budd is based on an amended statement of claim. The amended statement of claim as filed had two

two counts, one alleging, on behalf of Brandes, that the defendants Home and Budd are indebted to Brandes for court reporting services in the sum of $2,672.25. The second count was filed on behalf of plaintiffs Schwarzbach and Preston, attorneys, and alleged that the defendants Home and Budd are indebted to the said plaintiffs in the sum of $3,000 for legal services rendered to the defendants. The statement of claim was verified by John G. Preston. The record contains an "Amended Counter-claim Count II," filed November 14, 1957. (The original counterclaim does not appear in the record.) The amended counterclaim was filed by the Home and Budd against Schwarzbach and Preston and alleges that Budd was and is the president of the Home and a member of its board of directors; that on or about June 1, 1957 the Home, acting through Budd, contracted orally to retain Schwarzbach and Preston, pursuant to authorization by resolution of its board of directors, to obtain a review by the Circuit Court of an administrative hearing held by the Department of Public Welfare of the State of Illinois, in which hearing the Home was a party. It is further alleged that the counterdefendant lawyers accepted employment and stated that the charge for their services would be $1,500 in full; that Budd paid them $1,500 as their fee and the payment was accepted by the law firm; that the firm afterwards, without consulting or informing the Home, ordered the court reporter firm to prepare a transcript of the testimony in the proceedings taken at the hearing; that the court reporter firm had been hired by the Home to attend the hearings and take down the testimony; that the transcript was

not necessary and after the work on the transcript was in progress the Home was informed of the facts and it informed its attorneys that it could not pay the court reporter for such a large order, and about the same time the attorneys advised the Home that they wanted $3,000 additional attorneys' fees; that they also threatened that if they, as well as the court reporter, were not paid at once they would withdraw from the case; that they did withdraw on or about July 19, 1957, and they thereupon filed a suit for an additional $3,000; that they had dealt with Budd only as president of the Home and not in her individual capacity, nor did she assume or guarantee the payment of any of the Home's obligations; that the claim filed by the attorneys was malicious and without good cause; and that the Home and Budd have been put to expense and caused damage thereby. There is a prayer for damages in the sum of $5,000.

Six firms of attorneys have appeared at different times in this case on behalf of defendants. The next to the last attorney in this case, John F. Haas, entered his appearance on June 26, 1958 and withdrew from the case on December 9, 1959 because of ill health. Numerous motions were filed in court by the defendants and no further action taken upon them. On May 10, 1960 the case was on the trial call. Mr. Haas appeared in court together with the defendant Budd. The case was continued until October 10, 1960. On October 10, 1960 the case was again called. No defense had been filed by either defendants, Budd or the Home, to either of the counts of the amended statement of claim. Counterdefendants Schwarzbach and Preston had filed a defense to the counterclaim.

The second count of the amended statement of claim was dismissed by the plaintiffs Schwarzbach and Preston, and on their motion the court dismissed the amended counterclaim filed by the Home and Budd against them. A jury was impaneled and evidence was heard on the first count of the amended statement of claim, and the jury returned a verdict finding in favor of the plaintiff Brandes against the defendants, the Home and Budd, for $2,672.25. The court entered judgment upon the verdict. Within thirty days, on November 7, 1960, the defendants filed a "petition" to vacate the order dismissing the counterclaim and the "order of default and judgment" entered on October 10, 1960. The petition was verified by Budd. This appeal is taken from the order of the trial court refusing to vacate the dismissal of the counterclaim and the judgment entered on October 10th.

The defendants here contend that the court by refusing to vacate the judgment order had abused its discretion, and further contend that Schwarzbach and Preston could not have properly filed a suit on behalf of Brandes on July 23, 1957 against the Home and Budd because the attorneys had represented the Home to and including July 19, 1957.

Defendant Budd filed a motion within thirty days to vacate the October 10th judgment order of the court. This motion is designated a "petition" and is verified. Since the establishment of the Municipal Court of Chicago the Municipal Court has been governed by its own rules, which rules are separate and independent of the Illinois Practice Act and need not, and frequently do not, have the same provisions. Pirie v. Carroll,

28 Ill. App.2d 181, 171 N.E.2d 99.

Section 1.5 of rule 3 of the Municipal Court of Chicago provides: "A motion to set aside a judgment entered upon default should show that the party has a meritorious defense to the claim and that he and his attorney have exercised reasonable diligence or a lack of jurisdiction. Upon consideration of the motion, the court, in its discretion, may open the judgment, permit the defaulted party to plead, and direct that the judgment shall stand as security."

In the motion made by Budd and the Home it is stated that "defendants and counter-plaintiffs failed to attend court at 9:30 A.M. on October 10th, 1960 because of the following circumstances: The attorney for defendants and counter-plaintiffs, John F. Haas on December 9th, 1959 withdrew his appearance, in the above entitled cause, that thereafter on May 10th, 1960 he was in court when said cause was continued until October 10th, 1960, that he had and still has in his possession files of defendants and counter-plaintiffs which files contained the pleading and records pertaining to trial dates, that defendant and counter-plaintiff, Florence J. Budd was in court on May 10th, 1960, that she made a mental note said cause was continued until November 10th, 1960, that she did not discover the error until the afternoon of November 3rd, 1960 when she checked the files in the above entitled cause in the office of the Clerk of the Municipal Court." It is further stated that "she believes defendants and counter-plaintiffs have a meritorious defense to said action by plaintiffs and also have a meritorious cause

of action in their counterclaim filed by them in the above entitled cause."

The right to set aside a default judgment rests in the sound discretion of the trial court and will not be disturbed by a reviewing court unless it is apparent that that discretion has been abused. In order to set aside a default it is necessary for the defendant to show that he has a meritorious defense, that due diligence was exercised, and that he had a reasonable excuse for not having made the defense in due time. Busser v. Noble, 8 Ill. App.2d 268, 274, 131 N.E.2d 637, 640. Neither in section 50 of the Practice Act nor in the rule of the Municipal Court of Chicago is there now any requirement that the motion be supported by affidavit. In Charles Ford & Associates v. Goldberg, 7 Ill.App.2d 241, 129 N.E.2d 337, the question was raised as to whether a motion brought in the Municipal Court of Chicago to set aside a judgment required either verification or support by affidavit. At that time the rules of the Municipal Court so provided. The court held that a simple motion would suffice, relying on section 2 of the "Act in relation to final judgments" etc., Ill. Rev. Stat. 1953, chap. 77, par. 83. In that case the court held that the plaintiff's unverified motion was supported by credible exhibits which lent prima facie credence to plaintiff's allegations.

In In re Estate of Hoymann, 27 Ill.App.2d 438, 170 N.E.2d 25, we held that the trial court improperly denied a petition seeking to set aside an ex parte order allowing

attorney's fees. In that case, which was cited by the defendants, the plaintiff filed a petition which the defendant answered, and this court on the basis of the petition and answer held that the fees were excessive and that the trial court should have set aside its order. In that case it was apparent that a meritorious defense had been raised. Widicus v. Southwestern Elec. Cooperative, 26 Ill.App.2d 102, 167 N.E.2d 799, is cited by the court, in which case it is said that it is not necessary under the statute that the court "now must categorically determine that a meritorious defense or a reasonable excuse be proven to justify setting aside a default. We believe that the discretion will be properly invoked if it is based upon principles of right and wrong and is exercised for the prevention of injury and the furtherance of justice," and it is further said: "We do not say that a defendant who fails to act by reason of negligence or without any reasonable excuse has a right to insist that he be allowed to defend."

We are not aware of any case holding differently from the rule laid down in the preceding paragraph. To so hold would not be in furtherance of justice, but would be an encouragement to delay.

In the Widicus case the plaintiff secured a default order three days after the expiration of defendant's time to plead. The court found that the defendant's explanation of its failure to plead was reasonable and that at the time the default was entered the parties were still negotiating with reference to settlement. The court again says: "Justice

will not be done if hurried defaults are allowed any more than if continuing delays are permitted. But justice might, at times, require a default or a delay. What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome." (Italics ours.)

Under section 72 of the Practice Act and section 72 of rule 1 of the Municipal Court it is still the rule that in case there are no defensive pleadings before the court there must be a showing that the defendant has a meritorious defense, otherwise it would be idle for the trial court to vacate the default. Nor can we say that a defendant who makes no excuse for his dilatory tactics can complain of the action of the trial court in refusing to vacate a default entered against him.

In the case before us the suit was filed on July 23, 1957. An amended statement of claim was filed on September 18, 1957. No answer to either was filed by the defendants. The default judgment was entered on October 10, 1960. Intervening between the filing of the suit and the entry of the default were numerous motions made by the defendants. Among others was one filed December 23, 1957 to dismiss the suit as to defendant Budd, and on December 27, 1957 a motion asking for a bill of particulars and a notice filed on the same day asking that the plaintiffs answer certain interrogatories. The court overruled the motion for the bill of particulars. The plaintiffs in turn filed various motions, among others, one on

on October 3, 1957 asking Budd to produce her personal books and records relating to the transactions in the case, and subsequently a further petition asking that defendants be ruled upon to show cause why they should not be punished for contempt of the court's order requiring the production of her books and records. Nothing further was done with reference to these motions. A motion upon which no order is entered or which is never called to the attention of the court is presumed to have been waived or abandoned. 60 C.J.S. Motions and Orders, sec. 42.

The order setting the case was entered on May 10, 1960. At that time the defendants' attorney, who had withdrawn his appearance the previous December, was in court. The affidavit of defendant Budd shows no reliance upon that fact. She relies solely upon her own memory as to the date when the case was set. From May 10th until the date when the ex parte judgment was entered nothing was done by the defendants. As was said in Dalton v. Alexander, 10 Ill.App.2d 273, 135 N.E.2d 101, "The question here as it is in every case where it is necessary to determine whether or not a person was negligent is whether such person was reasonably justified under the circumstances in acting as he did. Where the neglect of a person can be charged to a reasonable assumption that no action on his part is required, such failure to act is not inexcusable. There appears to be no hard-and-fast rule by which a court may be guided in cases which require determination as to whether a person is, by his conduct, guilty of inexcusable neglect." In the instant case, in the motion

made by the defendants to set aside the judgment the statements made are not sufficient to show that they were not guilty of inexcusable neglect. Nor is there any showing made that the defendants had a meritorious defense or any defense whatsoever to the allegations made in the statement of claim. A motion to vacate a default judgment, made within 30 days after the judgment was entered, is a continuation of the action and is not governed by the same procedural requirements as a petition brought under section 72 of the Civil Practice Act or section 72 of rule 1 of the Municipal Court. In Boyle v. Veterans Hauling Line, 29 Ill.App.2d 235, 172 N.E.2d 512, we pointed out that such a petition is a new action and not a continuation of the suit, and under those circumstances in order to question the sufficiency of the petition it is necessary to file a motion to strike and there can be no review of that question unless the trial court entered an order on such motion.

The trial court properly refused to vacate the judgment entered against Florence J. Budd and the dismissal for want of prosecution of the counterclaim filed by her and the Home. The question as to whether the trial court properly ruled in refusing to vacate the judgment against the Home requires further consideration.

Brandes testified in the ex parte hearing that he refused to extend any credit to the Home and that he contracted with, and extended credit to, Mrs. Budd upon her assurance that she personally would pay the bill. The rule with reference to contracts made on behalf of a disclosed

principal through an agent is that the contract is that of the principal alone. But the rule also is that "'where the vendor, at the time of the sale, knows the principal and understands that the buyer is the mere agent of another, and elects to give credit to the agent, making him the debtor, he cannot afterwards resort to the principal.'" Allen v. Liston Lumber Co., 183 N.E. 747, 749 (Mass.). See also 3 C.J.S. Agency, sec. 243; 2 Am. Jur. Agency, sec. 315; Kusek v. Allied Packers, Inc., 246 Ill. App. 209, 216. Upon the evidence in the record before us the jury could not properly find in favor of Brandes against the Home. Brandes could only properly obtain a judgment against Florence J. Budd, and the trial court erred when it refused to vacate the judgment against the Home. Section 50, subparagraph 7, of rule 1 of the Municipal Court confers upon the court power to set aside a joint judgment as to fewer than all the parties.

The defendants argue that Schwarzbach and Preston could not properly represent Brandes since they had formerly represented the defendants in the case upon which Brandes' claim was predicated, and that consequently the court should have vacated the judgment against the defendants. We make no holding here as to whether or not this contention of the defendants is tenable. There is no indication in the record that this question was ever raised before the trial court. The motion to set aside the judgment makes no reference to this contention.

The jury's verdict was a finding for Brandes against the defendants Budd and the Home. The judgment order entered by the court dismissed Count II of the amended complaint. The

only plaintiff left in the case was Brandes. The court improperly entered judgment in favor of "the plaintiffs."

The judgment order of October 10, 1960 had as its integral parts the dismissal of Count II of the amended statement of claim, the dismissal of defendants' counterclaim, and the entry of judgment in favor of "plaintiffs" against defendants Budd and the Home. The motion of defendants prayed that the court vacate the judgment and the dismissal of the counterclaim. The order denying the motion was entered on December 6, 1960, and in the same order the court corrected its judgment to read in "contract" instead of in "tort." While the notice of appeal states that this appeal is taken from two orders of December 6, 1960, the record discloses the entry of only one order under that date.

Insofar as the order of December 6, 1960 corrected the judgment of October 10, 1960 to read in "contract" and also denied that part of defendants' motion to vacate the dismissal of their counterclaim the order is affirmed. Insofar as it denied that part of defendants' motion to vacate the judgment entered in favor of Joseph J. Brandes against Florence J. Budd the order is also affirmed. In all other respects the order is reversed, and the cause is remanded with directions to sustain defendants' motion to vacate the judgment in favor of plaintiffs against the Illinois Protestant Children's Home, Inc., and to correct the judgment standing against Florence Budd so as to make it read in favor of plaintiff Joseph J. Brandes against Florence J. Budd, instead of in favor of "plaintiffs."

Affirmed in part; reversed in part
and remanded with directions.

48579

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Defendant in Error,	)	WRIT OF ERROR TO MUNICIPAL COURT OF CHICAGO.
v.	)	
MICHAEL KRIZANOVIC,	)	
Plaintiff in Error.	)	

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The defendant, Michael Krizanovic, was convicted of the offense of malicious mischief after a trial without a jury, and was sentenced to the House of Correction for one year. He has been incarcerated since the date of his trial, June 23, 1961.

The case is before us on a writ of error and the errors assigned are three: (1) the defendant was not proved guilty beyond a reasonable doubt; (2) the information failed to properly allege the ownership of the property injured, and (3) the State did not prove the ownership of the property.

Inasmuch as the third of these points requires the reversal of the judgment, there is no need to discuss the first and second. The State failed to answer the third point in its brief and in its oral argument in this court. This omission may be a tacit acknowledgment of the frailty of its proof in the trial court concerning the ownership of the damaged property.

The information charged that Krizanovic: "Did willfully and maliciously break two sky light windows of

the Goodman's Community Department store, 3161 N. Clark St. without the consent of the owner. Value of the windows $20.00. In violation of Para. 425 Chap. 38, Ill. Revised Statutes of 1959."

The evidence was that on May 29, 1961, about 3 A.M., Maurice Lavine, who was associated with the Goodman store, was in the building and heard knocking on the roof near the fire escape. He heard the noise three different times and at the third time the burglar alarm went off. As it did so, he noticed that someone was trying to get in and he saw a shadow through the glass of the skylight, which he later found was broken. He called the police. James De Reed who was walking down the street heard the burglary alarm. He saw no one inside the front of the store so he went around to the side where he saw the defendant come down the rear stairs and climb over the back fence. He called for him to stop, then chased and caught him without ever losing sight of him.

Krizanovic told the police that he had been in a tavern in the neighborhood but did not tell where it was. He denied being in the building. A policeman said he had been drinking but was not intoxicated, and that no splinters of glass were found upon him. Krizanovic testified that he had been drinking beer and went into an alley to relieve himself. While there he heard a burglar alarm go off three or four doors away. He denied being on the roof of the store and breaking the glass. He said he ran because he

thought the man coming after him intended to rob him.

In a prosecution for an offense against property the ownership of the injured property must be stated in the information or indictment. People v. Flaherty, 396 Ill. 304, 71 N.E.2d 779; People v. Burnett, 394 Ill. 420, 69 N.E.2d 856. It is not required that the ownership of the fee be stated; it is sufficient if the ownership is laid in one who is in lawful possession of the property. People v. Stewart, 23 Ill. 2d 161, 177 N.E.2d 237; People v. Hardt, 329 Ill. App. 153, 67 N.E.2d 487. Since the State alleged the skylight windows were those of the Goodman store it was necessary for it to prove that the damaged building belonged to, or was occupied by, or was in the possession of that store. The Goodman store was mentioned only twice in the testimony. Once was when the witness De Reed said he "believed" he was passing that store when he heard the alarm; the other was when the witness Lavine said he was associated with Goodman's.

Lavine did not state what his association was. He was not asked the address or location of the Goodman store, or the address or location of the building he was in when he heard someone on the roof, and he was not asked who owned, leased or occupied the building. He was asked if he had occasion to examine "your premises," but he was not asked if he examined the Goodman premises. There was no proof that the Goodman store was the sole owner, an owner, the sole tenant or one of several tenants. There was no description of the premises and from the evidence we cannot

tell if the broken skylight was in a part of the building occupied by Goodman, or was in a part occupied by someone else, or if it was in a common roof over more than one store. Because Lavine mentioned a fire escape, we would presume that the building was more than one story high, but from the evidence we cannot tell if it had one, two, three or more floors, or if there were apartments in addition to the store or stores.

In People v. O'Brien, 404 Ill. 236, 88 N.E.2d 486, (a malicious mischief case in which the evidence of lawful occupancy was much stronger than in the present case) the indictment charged that O'Brien maliciously defaced a dwelling house in the lawful possession of Charles Stransky, occupied and owned by him. The evidence was that Stransky lived in a three-room apartment in the back of a one-story building containing two stores. At 6:30 one morning he heard someone at his rear door. The door opened, the defendant entered and told Stransky to put up his hands. Stransky seized the intruder and put him out. He later saw that two screws had been torn from the door. The Supreme Court said:

> "No formal proof was offered concerning the ownership of either the three-rooms used by Stransky as living quarters, or the two storerooms in the building. There was no testimony concerning the nature or extent of the occupancy of the building by Stransky, or whether his possession was lawful, exclusive, or otherwise. Under this state of the record it cannot be said that the People have sustained the burden of proving the ownership of the premises.
>
> "While proof of possession of the building by a

> lessee, or anyone entitled to lawful possession thereof, would have been sufficient proof of ownership as against a wrongdoer, the People in this case have utterly failed to make proof of ownership of any character. Requiring certainty in an indictment and making a material variance between the indictment and the proof fatal to a conviction is not a mere empty form. It represents more than a technicality—it is a substantial right of the defendant to have the crime charged and proved with such certainty as to protect him in the future against double jeopardy. People v. Clavey, 355 Ill. 358."

The record here is devoid of direct evidence as to ownership, of the right of possession or of lawful occupancy, and no reasonable inference as to these indicia of ownership can be drawn from the circumstances in evidence. The judgment of the Municipal Court must be reversed.

Reversed.

McCormick, P.J., and Schwartz, J., concur.

Abstract only.

48467

STEVE B. MALECKI,	)	
Plaintiff-Appellant,	)	APPEAL FROM THE
v.	)	CIRCUIT COURT OF
STANLEY STOLLER,	)	COOK COUNTY.
Defendant-Appellee.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This case involves an appeal from an order dismissing an action for slander. No brief has been filed on behalf of defendant-appellee. Defendant is an attorney whose client claimed to have been defrauded by plaintiff in a transaction for the purchase of an automobile. Defendant made a complaint to the State's Attorney, and a hearing and conference was arranged with an assistant state's attorney for the purpose of determining whether the State's Attorney should institute prosecution against plaintiff. During the course of the hearing defendant made the following statments:

> "(a) You fellows [meaning the plaintiff and others interested in the Bank] pass a lot of hot money at the Bank [meaning the South Side Bank & Trust Co.] for the hoods.
>
> (b) You fellows [meaning the plaintiff and others interested in the Bank] are running a bucket-shop.
>
> (c) You, Malecki, are a criminal--your eyes are slanted like a criminal's. You must have a police record."

Plaintiff then instituted this suit.

Defendant filed four motions to dismiss the complaint pursuant to Section 48 of the Civil Practice Act. The first motion was denied, the second and third were stricken,

defendant found in default for failure to file an answer, and a judgment entered against him for $1000. On petition of defendant an order was entered vacating the default and judgment, allowing defendant to answer and plead, and permitting a fourth motion to dismiss to stand as properly filed. The motion was based on the proposition that the alleged slanderous remarks were absolutely privileged and as such could not be the basis of an action for slander. Finally, on December 14, 1960 the court entered an order sustaining defendant's motion, dismissing the cause and entering judgment in favor of defendant and against plaintiff for costs.

Plaintiff's first point is that the court abused its discretion in allowing defendant to raise his defense by a motion to dismiss when a similar motion had been adversely disposed of on its merits. Had the orders as amended not included leave to file further pleadings and the allowance of the fourth motion to stand as properly filed, defendant could not have raised by answer the same defense raised in the earlier motions. Ill. Rev. Stat., ch. 110, § 48 (4), 1959. Subject to that provision of the Civil Practice Act, a court has the right to correct what it concludes was an erroneous ruling at any time before final judgment. Stanko v. Zilien, No. 48404, Ill. App. Ct., 1st Dist., opinion filed December 5, 1961; Roach v. Village of Winnetka, 366 Ill. 578, 581, 10 N.E.2d 356-57; Shaw v.

Dorris, 290 Ill. 196, 204, 124 N.E. 796, 799-800. There is some authority to the effect that the privilege is applicable to a conference or hearing such as the one in question, but it is not clear. Dean v. Kirkland, 301 Ill. App. 495, 501, 510-11, 23 N.E.2d 180, 184, 188; Restatement, Torts, §§ 586-87 (1938); Vogel v. Gruaz, 110 U.S. 311 (1884); Krumin v. Bruknes, 255 Ill. App. 503. We do not deem it advisable to determine this question in an ex parte hearing. It is not necessary to do so because in any event the slanderous statements must be pertinent to fall within the rule, and it is our conclusion that these remarks were not pertinent to the matter under discussion. Maclaskey v. Mecartney, 324 Ill. App. 498, 58 N.E.2d 630.

The context of the remarks as shown in defendant's motion and affidavit rebuts any presumption of their relevancy. His client's complaint involved the sale of an automobile. Defendant accused plaintiff of "passing hot money," "running a bucket shop," and of being a criminal and possibly possessing a police record. These were serious charges and were not within the assumed privilege.

The judgment is reversed and the cause is remanded with directions to overrule the motion to dismiss, to require defendant to answer the complaint, and for such other and further proceedings as are not inconsistent with the views herein expressed.

¶ Judgment reversed and cause remanded with directions.

¶ McCormick, P.J., and Dempsey, J., concur.

~~Abstract only.~~

48388

GEORGE M. FERRELL, JR.,	)	APPEAL FROM
Plaintiff-Appellant,	)	SUPERIOR COURT
v.	)	COOK COUNTY
CHICAGO TRANSIT AUTHORITY, a Municipal Corporation,	)	
Defendant-Appellee.	)	

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a summary judgment against plaintiff in a personal injury case. Defendant moved for summary judgment, pursuant to Section 57 of the Civil Practice Act, and averred in support of the motion that the admissions of plaintiff demonstrate that plaintiff was guilty of contributory negligence as a matter of law, thus barring him from recovery. These admissions were contained in plaintiff's testimony under oath in a pre-trial discovery deposition.

The accident in question occurred on April 19, 1958, at approximately 8:20 a.m., some 200 feet south of the "L" station at Polk and Paulina Streets in Chicago, Illinois. Plaintiff, an employee of the subcontractor Kil-Bar Electric Company, was working in the cage of a Pitman giraffe cage truck in connection with repair work being done on the "L" structure. The cage of the giraffe was close to the east edge of the ties which supported the rails on the northbound tracks, but not resting against them. The giraffe and the cage attached to it were moved by means of a gasoline hydraulic engine located on the truck on the ground. Plaintiff and his supervisor had been in

the cage some seven minutes prior to the accident and no elevated trains had passed them. Plaintiff was standing in the west part of the cage which was the side nearest the northbound tracks. His superior, Francis Walin, was in the cage and had given him instructions where to weld the brackets on the "L" structure. Plaintiff then leaned over the cage to signal the operator of the giraffe to let them down and he was immediately struck on the left arm by a northbound elevated train.

The relevant portion of plaintiff's deposition upon which the summary judgment rests was the answer to the question of how the accident happened. Plaintiff answered: "I was up in the cage, in the work cage of this giraffe. My boss was giving me instructions where to weld brackets. And he completed instructions and told me to take him down. And so I leaned over to signal the operator to let us down. And the next thing I know I got hit."

Plaintiff did not present any counter-affidavits and the factual record before the trial court, in addition to the pleadings, consisted of plaintiff's deposition and defendant's answer to interrogatories. Plaintiff's only response to the motion for summary judgment was a memorandum in opposition to the motion, which claimed that defendant's motion failed to disclose any of the following: that plaintiff had any authority over the operator of the giraffe; that plaintiff should have known that he was in a position of peril; measurements of distance between plaintiff and the nearest edge of the tracks; plaintiff's position in relation to the tracks or the passing train;

plaintiff's responsibility for placing warning flags; any evidence of noise made by the train which plaintiff might have heard.

These assertions are either patently disproved by the record or become irrelevant in view of the uncontradicted evidence showing plaintiff's contributory negligence. The memorandum in no way contradicts defendant's evidentiary matter, and plaintiff did not offer counter-affidavits or any other evidence.

The pleadings, deposition, and affidavit show that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. ILL. REV. STAT. 1959, ch. 110, § 57. Plaintiff knew he was working in immediate proximity to a dangerous place and as a matter of law failed to exercise the amount of care commensurate with the known danger. Even if it were assumed that defendant was negligent, which is itself very doubtful, the summary judgment was founded on plaintiff's contributory negligence which was a complete bar to the action.

Although contributory negligence ordinarily presents a question of fact, it becomes a question of law when, from the undisputed facts, all reasonable minds in the exercise of fair and honest judgment would be compelled to reach the conclusion that there was contributory negligence. Lasko v. Meier, 394 Ill. 71; Simaitis v. Thrash, 25 Ill. App. 2d 340. The propriety of awarding summary judgment depends upon whether or not a bona fide issue of fact exists between the parties. Where the pleadings and affidavits show there is no bona fide triable issue of fact, a summary judgment should be granted. People ex rel. Sharp v.

City of Chicago, 13 Ill. 2d 157; Porter v. Miller, 24 Ill. App. 2d 424.

To say that this record presents a triable issue of fact as against the uncontradicted evidence showing that plaintiff caused the accident himself and was negligent as a matter of law, would make the summary judgment procedure substantially without utility. See Porter v. Miller, supra, at 430.

The judgment is affirmed.

FRIEND, P.J., and
BURKE, J., concur.

48448

JOHN BARRON, a minor by DANIEL J. BARRON, his father and next friend,	)	APPEAL FROM
Plaintiff-Appellant,	)	SUPERIOR COURT
v.	)	
MRS. GERTRUDE BOVAR, Administratrix of the Estate of DAVID BOVAR, Deceased,	)	COOK COUNTY
Defendant-Appellee.	)	

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

An action to recover damages for injuries to a three year old boy caused by the alleged negligence of David Bovar in driving his oil truck, resulted in a judgment against plaintiff on a directed verdict. He appeals.

John Barron, age three, was allowed out to play in a fenced-in yard in front of his house at 956 East 93rd Street, Chicago, at about 4:00 P.M. on February 2, 1953. The weather was good and there was daylight. John's home was on the north side of the street about one-half block west of Ellis Avenue. Three buildings to the east of plaintiff's house near the corner stands a hardware store owned by Violet Angel. Other houses and stores are located on the north side of 93rd Street east of Ellis Avenue. Ninety Third Street is a four lane highway 42 feet wide running in an easterly and westerly direction. The pavement was clear of ice and snow. Ellis Avenue is a two lane street running in a northerly and southerly direction. It enters but does not continue south of 93rd Street. The intersection forms a "T". There was a bus stop for eastbound

busses on the south side of 93rd Street at the end of Ellis Avenue. Directly across the street from the Barron home on 93rd Street stands the United Motors Building. To the east of that building is a vacant prairie extending a considerable distance east of the intersection of 93rd Street and Ellis Avenue. The children of the neighborhood play in this prairie. Under the city numbering system, Drexel Avenue to the west of the Barron home is 900, Ellis Avenue, to the east of that home, is 1000 and Dobson Avenue, one block east of Ellis Avenue, is 1026.

Apparently the only eye witnesses to the mishap were the three year old plaintiff and the owner-operator of the truck, who died prior to the trial. No eye witness testified. A police officer who interviewed the driver testified without objection as to the statements made by him. The case was tried in October, 1960, more than 7 years after the occurrence. Dan Barron, who was seven years old at the time of the mishap, remembered the day his brother John was injured. He recalled that the prairie is on the south side of 93rd Street, east of Ellis Avenue and about one-half block east of his house. The last place he saw John before he was injured was in the fenced-in yard. Dennis Lake, a friend of Dan, not called as a witness, was with Dan and John in the yard. John was an active boy. He had a habit of following Dan. Dan and Dennis opened the gate, latched it and ran through the gangway alongside of the Barron lot to 93rd Street. A few cars were moving on 93rd Street. The two boys ran diagonally across 93rd Street in a southeasterly direction and reached the south sidewalk at the bus stop at the

end of Ellis Avenue. They ran along the sidewalk to a point in the prairie about one-half block east of Ellis Avenue. At that time Dan turned around to see if John was following. He saw a man carrying John around the side of the Barron house. An unoccupied oil truck facing to the southeast was stopped at or in the intersection of 93rd Street and Ellis Avenue about one-half block west of where Dan was standing. He did not see the truck strike John. He went home where he saw John crying on a bed.

Pursuant to a stipulation the statement of Mrs. Violet Angel was read. She operates a store at 3059 East 92nd Street. From other evidence it appears that her store occupies the second lot west of Ellis Avenue, and that the Barron home is 3 lots west of her store. When asked whether she had any knowledge of an auto accident on February 2, 1953, at or near 1015 East 93rd Street in which John Barron was injured, she answered in the affirmative. She first learned of the accident when the driver carried the boy into her store. The driver was concerned about finding the boy's mother. "About five or ten minutes" after the driver carried the boy into her store Mrs. Angel went out. She saw the oil truck stopped in the middle of the intersection of 93rd and Ellis Avenue facing in a southeasterly direction. She did not notice any skid marks. She did not see any cars parked on 93rd Street.

Marcelle Barron, the mother of John, gave him permission to go out to play about 4:00 P.M. At 4:20 or 4:30 P.M. the driver of the truck came to her door carrying John. The driver said he hit her son with his truck. At that time both the

driver and Mrs. Barron thought the boy was "all right." The driver wrote his name and address on a slip of paper, gave it to the mother and left. John was crying and sleepy, his pants were torn and his right leg was swelling. He was taken to a physician and then to a hospital. He suffered a fracture of the right leg.

Archie Reed, a police officer assigned to the Accident Prevention Unit, investigated the occurrence. He was not notified of the injury until almost 4 hours after it happened. At 8:00 P.M. he went to the home of David Bovar and questioned him. Bovar told Reed that he was driving east on 93rd Street and "between Ellis and Dobson a child suddenly darted out between two cars, running from south to north across 93rd Street. I swung to the left and put on my brakes and then I went back and picked him up. Then I took him home." The witness testified further that Bovar told him he was driving east on 93rd Street and that at 1015 East 93rd Street a child ran out before he could stop and that he struck the child with the right front of the oil truck. He told the police officer he was driving 15 or 20 miles an hour and that he "noticed danger 15 feet away"; that the person "was 3 feet away when he first observed him"; and that the condition of his brakes was good. Reed also testified that Bovar said he was going 20 miles per hour, that he "noticed" danger 15 feet away, and that his speed was 20 miles per hour at impact. Officer Reed remembered the speed limit on 93rd Street to be 25 miles an hour. He inspected the oil truck and found no "damage." Bovar signed a statement in which he said he was 38 and self-employed, that he was traveling 15 miles per hour

and that the person was 3 feet away when he first observed him. Reed said that Bovar appeared to have normal reaction time and that the stopping distance should be 50 feet at 15 miles per hour. He also said that an automobile going 15 miles per hour will travel 30 or 40 feet after the brakes are applied.

Plaintiff's position is that the evidence and inferences therefrom were sufficient to submit the case to the jury, and that the cogency or persuasiveness of the proof is particularly within the province of the jury. Because of the age of the boy there is no question of contributory negligence. The parties are in agreement that a motion to direct a verdict at the close of plaintiff's case should be denied if there is any evidence with its reasonable inferences, viewed most strongly in plaintiff's favor, which fairly tends to prove the material allegations of the complaint. Plaintiff insists that there is sufficient evidence that the driver had an unobstructed view of the child, that he failed to keep a proper lookout, and that the court erred in concluding that all reasonable minds would agree that the defendant was not negligent in driving down a 42 foot street in daylight at 20 miles an hour and failing to see a three year old child crossing the street from north to south. Plaintiff maintains that it is obvious that the impact occurred west of where the truck came to a stop, which would place the impact in the intersection or a short distance west of it. He argues that the younger boys, after crossing the street diagonally, reached the south side of 93rd Street at the bus stop in the intersection at the end of Ellis Avenue and that one could

reasonably conclude that plaintiff not only followed the older boys, but also crossed the street in the same manner and that the child was in the west crosswalk of Ellis Avenue when hit by the truck.

The burden of proof was upon plaintiff to show that David Bovar was negligent. The only evidence of how plaintiff was crossing the street was contained in the driver's statement that "a child suddenly darted out between 2 cars running from south to north." Plaintiff speculates that the child would be supposed to have followed his older brother from north to south. One can equally suppose that John followed his brother from north to south and turned to return home from south to north. Plaintiff also speculates that since the boy's right leg was injured, he must have been going from north to south. His mother testified that "his pants were torn on both legs." The position of the truck viewed by witnesses an appreciable time after the occurrence is not evidence of negligence. The driver stated to the police officer that the accident occurred opposite 1015 East 93rd Street, which is about 5 houses east of Ellis Avenue. Mrs. Angel did not leave her store to view the scene until Bovar had carried the boy from her store in the act of bringing him to his mother's house. When Dan Barron turned around he saw the driver carrying John into his mother's house. Therefore an appreciable time elapsed between the occurrence and the observation of the scene by these two witnesses. The driver had to stop his truck, go back and lift the boy in his arms, carry him to Mrs. Angel's store, talk to Mrs. Angel and then

carry him into the boy's own house. After the occurrence the truck was at the intersection of 93rd Street and Ellis Avenue. No one testified that the driver backed the truck up. Defendant says that the only inference to be drawn from the position of the truck is that the driver did back up the truck. There is no evidence that the mishap occurred at the intersection. It was incumbent upon plaintiff to prove negligence on the part of defendant. Conjecture cannot be the basis of liability. Louis v. Checker Taxi Co., 318 Ill. App. 71, 74; Brown v. Boyles, 27 Ill. App. 2d 114, 124; Kuhnert v. Whalen, No. 48160 (1961). There was no evidence of negligence of the driver. The trial court was right in directing a verdict for the defendant.

The judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND, P.J., and
BRYANT, J., concur.

No. 11555 Publish Abstract Only Agenda 17

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT., SECOND DIVISION

OCTOBER TERM, A.D. 1961

FLORENCE W. PARK, Plaintiff-Appellee, vs. HARRY BARBER, J. W. BARBER, and B. BARBER, Defendants-Appellants.	Appeal from Woodford County Circuit Court.

WRIGHT, J.

The plaintiff, Florence W. Park, on March 3, 1960, instituted a forcible entry and detainer action in the Circuit Court of Woodford County, Illinois, against the defendants to recover possession of her farm consisting of 240 acres. The case was tried before a jury, which returned a verdict in favor of the plaintiff. Judgment was entered on the verdict on April 19, 1961. From this judgment, defendants appeal.

The defendants were in possession of the premises in question and had been in possession under an oral year to

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, SECOND DIVISION

OCTOBER TERM, A.D. 1961

FLORENCE V. YOUNG, Plaintiff-Appellee, vs. GERTRUDE SANDER, J. E. SANDER, and T. SANDER, Defendants-Appellants.	2C 31 JAN 3 1962 Appeal from Kankakee County Circuit Court.

MR. JUSTICE [illegible] A.

The plaintiff, Florence V. Young, on March 1, 1960, instituted a forcible entry and detainer action in the Circuit Court of Kankakee County, Illinois, against the defendants to recover possession of her farm consisting of 160 acres. The case was tried before a jury, which returned a verdict in favor of the plaintiff. Judgment was entered on the verdict on April 12, 1961. From this judgment, defendants appeal.

The defendants were in possession of the premises in question and had been in possession under an oral lease to

year lease commencing on March 1st of each year and ending on the following February 28th. Pursuant to such lease, the defendants were in possession of the farm and were farming the land for the year commencing on March 1, 1959.

In September, 1959, the plaintiff verbally notified the defendants that their tenancy would be terminated on February 28, 1960, and thereafter on the 19th day of November, 1959, the plaintiff caused a written notice to be served on defendants by her son, Robert W. Park, notifying defendants to quit said premises and deliver possession to the plaintiff on or before February 28, 1960.

The defendants refused and failed to vacate the premises on or before February 28, 1960, and the plaintiff thereafter on March 3, 1960, filed this suit to recover possession of her farm. The defendants remained in possession during the entire year of 1960 continuing their farming operations, and have remained in possession of the premises during the 1961 crop year and are still in possession.

All negotiations with the defendants were carried on by the plaintiff, her farm manager, Roland Tucker, and her son, Robert W. Park. It was the custom for the plaintiff's farm manager to deliver a farm plan for farming the land to the defendants each March for the ensuing crop year. In March, 1959, in pursuance of this custom, the plaintiff's

farm manager submitted to the defendants a written farm plan for the farming of the land in question for the crop year 1959. At that time nor at any later time, there was no discussion between the defendants and the plaintiff's farm manager with reference to renting the farm for the crop year 1960, and no farm plan was submitted at any time to the defendants for the farming year 1960. No verbal or written agreement was entered into for the rental of the farm to the defendants for the farm year 1960. There was no seed furnished by the plaintiff to defendants for that year, no farming instructions to the defendants or supervision made of the farming operations after March 1, 1960. The defendants continued to farm the land after March 1, 1960, without authority from the plaintiff. The defendants tendered cash rent to the plaintiff after March 1, 1960, but it was not accepted by the plaintiff.

In the month of September, 1960, and on other occasions, defendants informed plaintiff's son, Robert W. Park, who was acting on her behalf, that they, the defendants, were making no claim to the farm for the crop year 1961. One of the defendants, J. W. Barber, referring to the negotiations with Robert W. Park, testified: "In September, 1960, I told him we have no claim on the farm for 1961." The defendant, B. Barber, referring to negotiations with Robert Park,

testified: "I told him we had no claim on the farm for the year 1961, because I didn't feel we did have." In October, 1960, plaintiff received from the elevator in Minonk her share of money for the bean and corn crop grown in 1960 on the farm.

It is the theory of the defendants that the plaintiff, by accepting the rent for her share of the bean and corn crop grown on the farm during the 1960 farm year, waived the notice to quit on or before February 28, 1960, which was served on November 19, 1959, and elected to treat defendants as tenants for the 1960 farm year and renewed the oral year to year tenancy.

A landlord may, by his acts and conduct, waive a notice to quit previously served by him on a tenant from year to year by accepting rent accruing subsequent to the expiration of the notice. Satorius v. Boeker, 330 Ill. App. 512, 71 N. E. 2d 851. Whether the acceptance of rent by the landlord from a tenant who holds over constitutes a waiver of a previous notice to terminate depends on the circumstances and conditions under which the rent was accepted.

Waiver is a question of intent and the acceptance of rent after a notice to quit has been given is not itself a waiver but merely evidence to be considered in connection with all the other circumstances in the case. Glad-Nan Corporation

v. Henry's Drive-In, Inc., 29 Ill. App. 2d 363, 173 N. E. 2d 521.

A landlord who has expressly indicated to a tenant his nonassent to a renewal or extension of a lease will not be held to have consented to such an extension by merely accepting rent after the tenant has held over. 45 A.L.R. 2d 842; Stillo v. Pellettieri, 173 Ill. App. 104.

In the instant case, plaintiff accepted crop rent for crops produced on the farm during the 1960 farm year after being told by the defendants that they were making no claim to the farm for the crop year 1961. Plaintiff did not in any way recognize the occupancy of the premises by the defendants during the crop year 1960. She furnished no farm plan and seed for that year and refused to accept cash rent for the 1960 farm year. No directions or authorizations were given by her with reference to the farming operations for that year. It is also clear from the record that the plaintiff expressly indicated to the defendants her nonassent to a renewal or extension of the lease at any time after the service of the notice in November, 1959.

It is clear from the evidence in the record that the plaintiff did not in any way recognize the defendants as legal tenants on her farm during the crop year of 1960, and we are compelled to the conclusion that the plaintiff did not, by

accepting the rent for her share of the beans and corn grown on the premises for the crop year 1960, waive the provisions of the notice to quit on February 28, 1960, which was served on defendants on November 19, 1959.

The defendants further argue that there was an oral lease entered into for the year 1960. Our search of the record does not reveal a scintilla of evidence that there was any such agreement entered into between the parties. In fact, after the oral notice to quit was given in September of 1959, by plaintiff's farm manager, the defendants asked the plaintiff and her son to reconsider the rental of the farm to them for the crop year 1960, and the plaintiff and her son advised the defendants that they would not reconsider the rental of the farm to them for the crop year 1960, and that plaintiff's decision to terminate defendants' tenancy was final.

Defendants further contend that the trial court erred in refusing Defendants' Instructions No. 1, 2 and 3. Courts have reiterated that jury instructions will be considered as a whole and where the jury has not been misled and the complaining parties rights have not been prejudiced by minor irregularities, such errors will not be deemed grounds for reversal. Duffy v. Cortesi, 2 Ill. 2d 511, 119 N. E. 2d 241. It is impossible for us to consider all of the jury instructions given in this case since they are not contained in the

abstract. Since all of the instructions are not abstracted, we cannot consider claimed errors in the giving or the refusing of instructions. Ankney v. Myroth, 177 N. E. 2d 6, (App. Ct., Second District, Second Division, 1961, No. 11503)

We conclude that the verdict of the jury in this case is amply supported by the evidence. A reviewing court will not set aside a verdict merely because the evidence is conflicting nor will it usurp the function of the jury by substituting its judgment for that of the jury in passing on the weight and credibility of conflicting testimony. City of Monticello v. Le Crone, 414 Ill. 550, 111 N. E. 2d 338.

The judgment of the Circuit Court of Woodford County is affirmed.

A F F I R M E D.

Spiry P. J. Concurs.
Crow J. Concurs

Henry G. Brown
Henry G. Brown

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Abstract

A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

331 A. 2d 398

General No. 10380 | Agenda 12.

G. S. Lyon and Sons Lumber and Manufacturing Co., a corporation,

Plaintiff-Appellant,

vs.

Alta E. Ellis,

Defendant-Appellee.

Appeal from the Circuit Court of Christian County.

REYNOLDS, J.

Plaintiff brought suit against Alta E. Ellis, as owner and against R. A. Brett, as contractor asking an accounting, an order for payment of the sums found due the plaintiff, a lien on the real estate of the defendant Ellis, and for foreclosure in default of payment. The trial court denied the relief sought against the defendant Ellis, but entered judgment against the defendant Brett for the amount of $3,113.34, and

Abstract

costs of suit. Plaintiff appeals to this court. The judgment against Brett was not appealed.

In September 1958 Alta E. Ellis entered into a verbal agreement with R. A. Brett, doing business as Modern Masons to build a home for her. Work was begun and the house was completed and defendant Ellis moved into the house in August 1959. In September 1958 defendant Brett opened an account with the plaintiff to supply lumber, millwork and building materials for this job, the arrangement being that he was to pay for materials received every 30 days. On March 12, 1959, Brett paid plaintiff $1744.83 being the account in full to that date. Thereafter materials were purchased up to August 3, 1959, to a total amount of $3112.66. On September 9, 1959, defendant Ellis paid Brett all but $100.00 of the contract price for the building of her home. On November 20, 1959, Brett went to the plaintiff's place of business and got a wooden threshold of the value of sixty-eight cents. He was sending two carpenters to the Ellis home to correct certain defects in the work that had been done in building the home, namely the lead troughs and the tile to the septic tank. Mrs. Ellis had requested Brett to do something about the bugs crawling under the door between

years of war. Statistics showed in this month. The judgment contains itself was not appealed.

In September 1970 Alfe S. Gilde entered into a verbal agreement with S. L. Garvey, acting individual in Calvin Township to install a tube for him. Work was begun and the tubes was completed and satisfactorily filled upon the tubes in August 1971. In September 1972 Gardenia Park commenced an account with the Plaintiff in supply lumber, millwork and building materials for this job, the arrangement being that he was to pay for materials received every 30 days. On March 14, 1973, there was outstanding $1756.00 being the account in full in that date. Thereafter materials were purchased up to August 4, 1973, to a total amount of $1213.00. On September 8, 1973, defendant Gilde paid first of $1000.00 of the materials price for the building of her home. On October 10, 1974, Gilde made to the plaintiff's place of business and got a receipt signed by the value of $1873.00 worth. In the months and arrangements to the Gilde home in repairs certain defects in the work that was been done in building the home, namely the lumber supplied and the title to the supply lumber. The Gilde has requested Gardenia to be satisfied about the work rendering under the last between

the breeze-way and the garage. Brett testified that he didn't know what she had in mind and that he got the wooden threshold in anticipation that he might use it on the Ellis job. When the carpenters brought the threshold Mrs. Ellis asked them what they were going to do with it and they told her they were going to put it between the garage and the breeze-way. She told them she did not want it there and it was not installed. Later, these carpenters took the threshold back to Brett and he testified he put it in stock and used it in another job.

The case hinges upon the sixty-eight cent threshold. The facts in the case and the pleadings are not in dispute. It is not contended that Mrs. Ellis required Brett to give her an affidavit in compliance with Section 5 of the Lien Act. Nor does the plaintiff contend that any notice under the provisions of Section 24 of the Lien Act was given Mrs. Ellis until 60 days after the pick-up of the threshold by Brett on November 20, 1959. The 60 days notice was given on January 19, 1960, which is within the 60 days period. If the 60 days notice was not given in apt time, then the plaintiff is not entitled to a lien. If the threshold was the last delivery on the

Ellis job, then the plaintiff had until January 19th, 1960 to give the 60 days notice. On the other hand, if the threshold was not a piece of material for the Ellis job, then the last day for the giving of the 60 days notice would have been October 2, 1959. And since the lien has to be based upon the Mechanic's Lien Act, if the plaintiff failed to comply with the provisions and requirements of that act, then there could be no lien or foreclosure of lien. It was conceded by counsel for the plaintiff before any evidence was taken in the cause, (Record page 58), that if the sixty-eight cent item, the threshold, was not the last delivery, then the plaintiff was not entitled to a lien. The necessity of the giving of this notice to the owner within 60 days, as required by Section 24 of the Lien Act, has been passed on many times by the courts of Illinois. Roth v. Lehman, 1 Ill. App. 2d 94; Shaffer v. Cullerton Corp., 13 Ill. App. 2d 72; Liese v. Hentze, 326 Ill. 633; United Cork Companies v. Volland, 365 Ill. 564. While the Lien Act has been held to be a remedial act, yet the cases are uniform in holding that since mechanics' liens are in derogation of the common law, therefore the statue creating them must be strictly construed. Roth v. Lehman, 1 Ill. App.

Hills job, then the plaintiff had until January 1th, 1960 to give the 60 days notice. On the other hand, if the threshold was not a piece of material for the Hills job, then the last day for the giving of the 60 days notice would have been October 2, 1959. And since the lien has to be based upon the Mechanic's Lien Act, if the plaintiff failed to comply with the provisions and requirements of that act, then there could be no lien or foreclosure of lien. It was conceded by counsel for the plaintiff before any evidence was taken in the cause, (Record page 58), that if the sixty-eight cent item, the threshold, was not the last delivery, then the plaintiff was not entitled to a lien. The necessity of the giving of this notice to the owner within 60 days, as required by Section 24 of the Lien Act, has been passed on many times by the courts of Illinois. Roth v. Lehman, 1 Ill. App. 2d 94; Shaffer v. Quilleyton Corp., 13 Ill. App. 2d 72; Lane v. Hughes, 326 Ill. 633; United Cork Companies v. Valland, 261 Ill. 364. While the lien act has been held to be a remedial act, yet the courts are uniform in holding that since mechanics' liens are in derogation of the common law, therefore the statute creating them must be strictly construed. Roth v. Lehman, 1 Ill. App.

2d 94; North Side Sash and Door Co. v. Hecht, 295 Ill. 515; Liese v. Hentze, 326 Ill. 633.

Plaintiff contends that under the provisions of Section 7 of the Lien Act, the evidence showed delivery of the threshold to the contractor Brett on November 20, 1959; that it was purchased by Brett specifically at the request of the defendant Ellis, and that it was delivered to her for use in the construction of the home. In support of such contention plaintiff relies upon the testimony of Brett that he had stopped at the lumber yard to pick up some items and picked up the threshold because Mrs. Ellis had requested that he do something about the bugs crawling under the door between the breeze-way and the garage; that he didn't know what she had in mind; that there were two types of thresholds for this particular type thing; that he got it with the anticipation he might possibly need it on the job. And the plaintiff contends the threshold was delivered to Mrs. Ellis for use, basing this contention on her testimony that the carpenters working for Brett brought a threshold, that she asked them where they were going to put it, and upon being told they were going to put it between the breeze-way and the garage, told them she didn't want it there.

The pertinent language of Section 7 of the Lien Act, relied upon by the plaintiff is as follows:-

"Provided, it is shown that such material was delivered either to said owner or his agent for such building or improvement, to be used in said building or improvement, or at the place where said building or improvement was being constructed, for the purpose of being used in construction...."

In the case of Colp v. First Baptist Church, 341 Ill. 73, at page 79, the court in construing the language above said: "The evident intention of the act was to relieve the materialman from the hardship of being compelled in the first instance to make proof that such materials were in fact used in the construction of the building, but it does not go to the extent of precluding the owner of the premises from rebutting, by competent evidence, the fact, if such is the fact, that the materials were not delivered for the purpose of use in the construction of the building. Delivery of the materials is not conclusive of the right to a lien, and no lien can be allowed when the proof demonstrates that such materials were not delivered for use in the construction of the building. Any other interpretation of the statute would permit gross in-

justice and fraud to be practiced upon innocent property owners."

In the instant case, while the plaintiff contends that the question of agency is not involved, yet a reading of said Section 7 of the Act shows that the plaintiff was required to show delivery, either to the owner or his agent for such building or improvement, to be used in said building or improvement, or at the place where said building or improvement was being constructed, for the purpose of being used in construction. Since there is no contention that the item was delivered at the place where the building was being constructed, the plaintiff is limited to a delivery to the owner or his agent. Delivery was to Brett, who must have acted as agent for the owner, in order to bind Mrs. Ellis. Here the evidence shows that the purported agent, Brett, picked up the threshold with the anticipation that he might possibly need it on the Ellis job. The evidence further shows that it was not used. Mrs. Ellis had requested that he do something about bugs crawling under the door. There was no meeting of minds between Mrs. Ellis and Brett as to what that "something" would be. It is true that it might have been used. But that is not sufficient

to show an agency on the part of Brett when he picked up the item on November 20, 1959. To say that the item was delivered for the purpose of use in the construction of the Ellis home would be to extend the language of the statute to include anything the contractor might pick up, whether suitable or not for use in the building. It would open the way for extension by months or even years of the date of the filing of the sixty day notice as required by Section 24 of the statute. It would also open the way for unscrupulous dealers to bind the property owner even though the item was not used or intended to be used.

Here, the evidence shows that the item was not ordered by the property owner; it was not specifically purchased by the contractor for the Ellis job; it was not used; it was not delivered to the owner or her agent; and when offered for use, was declined by the owner. Under the circumstances, this court must agree with the trial court that the plaintiff has not proved a material allegation in its complaint, namely that the defendant R. A. Brett was acting as agent for defendant Alta E. Ellis. In the absence of such proof, it must be held that the delivery of the item on November 20, 1959, namely the threshold, was not the last delivery of material but that the last

to show an agency on the part of Brett when he picked up the item on November 20, 1929. To say that the item was delivered for the purpose of use in the construction of the Ellis home would be to extend the language of the statute so include anything the contractor might pick up, whether suitable or not for use in the building. It would open the way for extension by months or even years of the date of the filing of the sixty day notice as required by Section 24 of the statute. It would also open the way for unscrupulous dealers to bind the property owner even though the item was not used or intended to be used.

Here, the evidence shows that the item was not ordered by the property owner; it was not specifically purchased by the contractor for the Ellis job; it was not used; it was not delivered to the owner or her agent; and when offered for sale, was declined by the owner. Under the circumstances, this court must agree with the trial court that the plaintiff has not proved a material allegation in its complaint, namely that the defendant E. A. Brett was acting as agent for defendant Alta E. Ellis. In the absence of such proof, it must be held that the delivery of the item on November 20, 1929, namely the shrubbold, was not the last delivery of material but that the last

delivery was on August 3, 1959. Consequently, the attempted notice on January 19, 1960, was too late and the lien was properly refused.

For the reasons above stated the judgment of the trial court is affirmed.

Judgment affirmed.

ROETH, P. J. and CARROLL, J., concur.

delivery was on August 2, 1959. Consequently, the attempted notice in January 1, 1960, was too late and the lien was properly released.

For the reasons above stated the judgment of the trial court is affirmed.

Judgment affirmed.

ROETH, P. J. and CARROLL, J., concur.

48478

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
v.	)	MUNICIPAL COURT OF THE
EDWARD C. BILL,	)	VILLAGE OF OAK PARK.
Defendant-Appellant.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant was arrested on December 23, 1960 following a collision between his car and another. In an information filed in the Municipal court of Oak Park, Illinois, he was charged with driving a motor vehicle, while intoxicated, upon a highway in the village of Oak Park, in violation of Ill. Rev. Stat., ch. 95-1/2, § 144, 1959. On January 23, 1961 he pleaded not guilty. The court heard witnesses, found defendant guilty, and fined him $350 and costs. At that time he had no counsel.

On February 20, 1961, the defendant, now represented by counsel, filed a petition to vacate the judgment and for a new trial. The basis for the petition was that defendant had not been represented by counsel nor advised that he could or should have been so represented; that he was not asked to take a sobriety test and hence there was no proof to show that he was intoxicated; that improper and illegal evidence was offered by the complaining witnesses; that the court failed to admit proper and legal evidence; that petitioner was not advised by the court of the seriousness of the charge of driving while intoxicated;

and that the alleged occurrence did not take place in Oak Park, Illinois. Hearings were had on the petition on February 23 and 27, 1961. The court denied the motion on February 27, 1961.

Defendant filed another motion on March 2, 1961 called a "Motion for New Trial." This time he urged that since February 26, 1961 he had discovered new evidence, to-wit: that six days prior to the original trial his mother had died and that he was unable to function with his usual good judgment and hence the necessity of retaining counsel to defend him at the trial was overlooked. He reiterated that if given an opportunity, he would show that he was not intoxicated; that the testimony of the complaining witnesses was erroneous; and that the court was without jurisdiction. He did not pray that the order entered February 27, 1961 denying the motion for new trial be set aside. He proceeded as if this were another motion to be heard anew. The matter was set for hearing on March 16, 1961 and again the court after a hearing denied the motion, treating it as an amendment of the earlier motion. Thereafter a notice of appeal was filed. It refers only to the order entered March 16, 1961 as the order from which defendant appeals. The motion upon which this order was based was filed more than thirty days after the entry of the judgment of conviction. A determination of the nature of this motion is necessary before considering one of the points urged for reversal, namely, that as no denial was made of the

allegations in the affidavit in support of the motion for new trial, the allegations are admitted.

While the Criminal Code provides that all motions for new trial shall be in writing (Ill. Rev. Stat., ch. 38, § 747, 1959) it states no time limitation. The cases merely indicate that a reasonable time should be allowed for the making of such motions. People v. De Pompeis, 410 Ill. 587, 102 N.E.2d 813; People v. Wilson, 400 Ill. 603, 81 N.E.2d 445. The Municipal Courts Act, however, is more specific. It states that if a motion to vacate, set aside or modify a judgment is made within thirty days of its entry, it will be treated in the same manner as would be a similar motion in the circuit court. Ill. Rev. Stat., ch. 37, § 471, 1959. Such motions in the circuit court are governed by Sections 68.1 and 68.3 of the Civil Practice Act, respectively dealing with jury and nonjury cases. Ill. Rev. Stat., ch. 110, §§ 68.1, 68.3, 1959. As does the Municipal Courts Act, these sections require the making of the motion within thirty days of the judgment. It is under these provisions that a motion for a new trial, on such grounds as errors in the admission or exclusion of evidence, or that the verdict is contrary to the manifest weight of the evidence, is made. As a motion made under these provisions, the March 2nd motion was not properly before the court.

As a mere restatement of the original motion which was properly brought under section 471 of the Municipal Courts Act, supra, with the additional recitation of so-called

"new evidence" which is neither evidence nor material except in mitigation of the penalty, the amended motion could not properly have been granted. Denial of the original motion was a final and appealable order. Emcee Corp. v. George, 293 Ill. App. 240, 12 N.E.2d 333. The subsequent motion could not properly take the place of an appeal. Kelly Lumber Co. v. Ruel, 302 Ill. App. 588, 24 N.E.2d 402. If a second motion could be filed to set aside the decision on the first motion within thirty days after that decision, but more than thirty days after the judgment, the finality of a judgment could be prolonged indefinitely and there would be an endless succession of motions. People v. Wells, 255 Ill. 450, 99 N.E. 606.

If we should assume the motion for new trial of March 2, 1961 to be in fact a petition of the kind required to set aside a judgment after expiration of the thirty day period, it still was wholly inadequate. Such a proceeding is governed by section 72 of the Civil Practice Act, Ill. Rev. Stat., ch. 110, § 72, 1959. It is a civil proceeding designed to take the place of a writ of error coram nobis and kindred proceedings. It is a separate action from that toward which it is directed and it applies to the municipal as well as the circuit court. The ground upon which such a proceeding is based is that there are matters of fact not appearing in the record which, if known to the court at the time judgment was entered, would have prevented its rendition. It lies to set aside a conviction obtained by duress or fraud or where by some excusable mistake or ignorance of the accused and without his negligence, he has been deprived of a defense cognizable in such

a post-trial hearing which, if known to the court, would have prevented his conviction. People v. Touhy, 397 Ill. 19, 72 N.E.2d 827. A petition stating that the defendant was prevented from introducing evidence showing his innocence is insufficient. Thompson v. People, 398 Ill. 366, 75 N.E.2d 767. The motion is not available to review questions of fact which arise upon the pleadings or to correct errors of the court upon questions of law. Jacobson v. Ashkinaze, 337 Ill. 141, 168 N.E. 647; People v. DuBois, 293 Ill. App. 498, 13 N.E.2d 87. There must be alleged in the petition some error in fact unknown to the court at the time of the trial. Newly discovered evidence touching the merit of the issues already tried is not ground for the motion. People v. Touhy, 397 Ill. 19, 72 N.E.2d 827; People v. Nakielny, 279 Ill. App. 387.

The allegations in defendant's motion relate to matters arising in the course of the trial. First among them is the charge that he was not advised of his right to counsel. The offense for which defendant was convicted is a misdemeanor. Ill. Rev. Stat., ch. 95-1/2, § 234, 1959. Therefore, the supreme court rule which requires advice to the accused of his right to counsel is inapplicable, since that rule pertains only to cases where conviction may result in imprisonment in the penitentiary. Ill. Rev. Stat., ch. 110, § 101.26, 1959. While under Article II, section 9, of the Constitution of the state of Illinois an accused is guaranteed the right to representation by counsel, the courts have held that this provision does not require that

the trial court advise a defendant of that right even when entering a plea of guilty in a noncapital case. People v. Wilson, 399 Ill. 437, 78 N.E.2d 514; People v. Bennett, 401 Ill. 403, 82 N.E.2d 465. Rather, it has been held that this is a right, personal to a defendant, which may be waived. People v. Stubblefield, 391 Ill. 609, 63 N.E.2d 762.

When the petition of February 20, 1961 came on for hearing, counsel for defendant offered to prove that defendant was not intoxicated at the time. The court, apparently remembering the case well, inquired whether this was not the case where "this man was passing up a number of cars at the intersection of Division and Austin Boulevard, and the cars on the north side of Division Street, facing south on Austin Boulevard, were waiting for the light to change and he ran head-on into them [and where] the occupants in the other car testified in their opinion that he was under the influence of intoxicating liquor?" Defendant's attorney told the court that defendant did not realize the seriousness of the charge; that he was not advised that he could or should have an attorney. The court then said that this was not the case; that in all cases of driving while drunk, he asks the defendants whether they want to get a lawyer. There is no report of the proceedings of January 23, 1961, and the statement of the court that he advised the accused that he should have counsel is conclusive.

The other errors complained of by defendant concern the conduct of the trial. At the hearings on the motion for

new trial, several witnesses at the trial were present. Defendant's counsel sought to show that they would have testified that defendant appeared sober shortly after the collision, and that his behavior at the time of the accident might be attributable to injuries he suffered. However, an examination of the record reveals no convincing evidence to support his position.

There being no report of proceedings in the record as provided in Ill. Rev. Stat., ch. 110, § 101.65 (1959) this court cannot consider errors concerning the admission of evidence or the conduct of the trial. People v. O'Connell, 411 Ill. 591, 104 N.E.2d 825; People v. Merrieweather, 11 Ill. 2d 619, 145 N.E.2d 48; People v. Watson, 12 Ill. 2d 250, 146 N.E.2d 53; People v. Devoney, 395 Ill. 560, 70 N.E.2d 584.

Defendant contends that the court had no jurisdiction. This grows out of the fact that the collision occurred at the intersection of Austin Boulevard and Division Street. That is the boundary line between the city of Chicago and the village of Oak Park. It was the court's recollection that the testimony showed that defendant was driving his car north on Austin Boulevard and collided head-on with a car going south in the southbound lane of Austin Boulevard, which would place the occurrence in the village of Oak Park. This was supported by the testimony of the complaining witness. Defendant challenges this finding by affidavit submitted with the motion for new trial and refers to a police report purporting to show the place of collision. There being no report of proceedings, there is nothing to show that the

police report was offered in evidence at the original hearing. Statements by counsel at subsequent hearings indicate that it was not. If it had been offered at the original hearing, it would have been inadmissible as evidence showing the place of collision. Moore v. Daydif, 7 Ill. App. 2d 534, 130 N.E.2d 119; Paliokaitis v. Checker Taxi Co., 324 Ill. App. 21, 57 N.E.2d 216; Branch v. Woulfe, 300 Ill. App. 472, 21 N.E.2d 148. In any event, it is not new evidence which would justify the granting of a motion for new trial.

The trial court appeared to realize fully the gravity of the charge. Defendant was given three hearings. We find no error in this case.

Judgment affirmed.

McCormick, P.J., and Dempsey, J., concur.

Abstract only.

48469

33 I.A.2d 477

CHARLES W. JAMIESON, Plaintiff-Appellant, vs. CHICAGO TITLE AND TRUST CO., a corporation of Illinois, et al Defendants-Appellees.	)	APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY

A

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff in a chancery action claimed that the purchase of stock in another corporation by defendant, Chicago Title and Trust Company, was in violation of its trust to him as a stockholder. This appeal is from an order dismissing the complaint for want of equity.

The facts are not in dispute. The defendant, an Illinois corporation organized under the General Corporation Act, is engaged in the abstract, title insurance and trust business in Illinois. On May 20, 1959, defendant Trust Co. informed its stockholders by letter (a copy of which was attached to the complaint) of its investments over the years beginning with 1943 in the common stock of Chas. Pfizer & Co., Inc., a Delaware corporation. The letter stated that a special dividend had been declared payable on June 10, 1959, in the form of Pfizer stock at the rate of one share of Pfizer for each twenty shares of C.T. & T. Co., which meant that by market valuation, the dividend amounted to about $2.00 on each share of C.T. & T. Co. stock;

that this dividend was in lieu of the $1.00 per share extra which had been paid at the year end in each of the last four years; that due to the phenominal growth of Pfizer the investment was extremely profitable and the present market value was about thirty times the original cost; that the Company, individually and as trustee, would continue to hold Pfizer stock; that they followed a policy of adding capital gains to reserves - after appropriate taxes; that these gains have not appeared in the Company's income account, nor have they been used to pay dividends as they were not operating earnings, nor were they necessarily recurring; and that the Board of Directors believed it was in the best interest of the shareholders to utilize the unusual capital gain as a special dividend.

On June 10, 1959, the company sent a second letter (a copy of which was attached to the complaint) informing its stockholders that the dividend of Pfizer stock was now payable and advising them that they would be apprised of the adjusted cost basis to be used by them for income tax purposes.

Plaintiff, Charles W. Jamieson, owner of 100 shares of C.T. & T. Co., received a certificate in his name for 5 shares of Pfizer with a circular letter stating "this is your dividend." Jamieson returned the certificate and subsequent dividend checks paid on the Pfizer stock stating that said stock was not acceptable as a dividend. On May 3, 1960, Jamieson demanded by letter that

the C.T. & T. Co. disburse to him his pro rata share of all Pfizer stock acquired by the company together with his pro rata share of all Pfizer dividends it had received plus interest at 5% compounded every time Pfizer Company paid a cash or stock dividend. The Trust Company responded by returning the 5 shares of Pfizer and the Pfizer dividends which Jamieson again returned to defendant.

This suit was filed pro se by Jamieson (an attorney) as a stockholder against defendant Trust Company, its directors and treasurer. This is not a representative suit. The individual defendants were never served. The order dismissing the complaint recited that both parties submitted the cause for judgment on the pleadings pursuant to §45(5), ch. 110, Ill. Rev. Stat. (1959), and that after considering the complaint, answer, written briefs and oral argument, the Chancellor entered judgment on the pleadings in favor of the C.T. & T. Co. and dismissed the complaint for want of equity.

Jamieson contends principally that defendant secretly purchased foreign stocks as a speculation where by law the funds were required to be invested in government, state and municipal bonds. Such speculation he insists is a breach of trust which entitles him to an accounting and damages.

The prevailing doctrine is that a corporation has no power,either to subscribe for or purchase shares of stock in another corporation,unless such power is expressly conferred upon it by its charter or other statute. Section 5 of the Illinois Business Corporation Act, [Ill. Rev. Stat. ch. 32, §157.5 (1959)],

however, provides in part, as follows:

> General Powers.
>
> Each corporation shall have power:
>
> ....
>
> (g) To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, loan, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships or individuals.
>
> ....
>
> (i) To invest its surplus funds from time to time and to lend money for its corporate purposes, and to take and hold real and personal property as security for the payment of funds so invested or loaned.

Jamieson contends that since the defendant was incorporated before the adoption of the present Business Corporation Act of 1933, it does not have the power to invest in other corporations. We do not agree. Section 156 of the Corporation Act of 1933, which now appears as §157.156, ch. 32, Ill. Rev. Stat. (1959), reads:

> The provisions of this Act shall apply to all existing corporations, ... organized under any general law of this State providing for the organization of corporations for a purpose or purposes for which a corporation might be organized under this Act.

In Lewis v. West Side Trust & Savings Bank, 376 Ill. 23, the defendant corporation claimed its purchase of bank stock was ultra vires on the theory it had not accepted the power conferred by the 1919 act giving it the right and power to own stock in other corporations. The court in discussing the above-quoted provision, said, at pages 42, 43:

> ... no reason appears to us why it should be necessary to include any of these powers in the charter before they could be exercised by a corporation. Since no method of accepting the 1919 act was provided, it was intended that it should at once apply to all corporations in this State ... the 1919 act under discussion changed the public policy of this State and permitted corporations to hold stock of other companies for the first time. It was included in the general powers granted all corporations, and they would have the power to hold stock in the absence of a restriction in their charters.

See also, Rockford Life Ins. Co. v. Production Press Inc., 15 Ill. App. 2d 50.

Jamieson in alleging a breach of trust averred that he has a proprietary interest in all of the assets of said Title and Trust Co.; that it would, therefore, take care of plaintiff's interests in a trust capacity; that he reposed full faith in and placed reliance and confidence upon the trust responsibility of said Title and Trust Company; and that plaintiff's claim is predicated upon an implied contract that defendant will hold undivided profits in cash and in trust for the use and benefit of plaintiff in distribution as dividends and extra dividends. The prayer of the complaint is that Jamieson's pro rata share of Pfizer be impressed with a trust in his favor and that all stock and cash dividends paid by Pfizer on his pro rata share be turned over to him with 5% interest compounded every time Pfizer Company paid a cash or stock dividend.

Directors and other officers, while not trustees in the technical sense in which that term is used, occupy a fiduciary

relation to the corporation and to stockholders. At common law, and by modern current of authority in this country and in England, the directors of a private corporation, while not regarded as trustees in the strict sense, are considered in equity as bearing a fiduciary relation to the corporation and its stockholders. 3 Fletcher, Private Corporations §838 (rev. perm. ed. 1960). In other words, it is universally recognized that courts of equity treat the relationship of director and stockholder as a trusteeship, in order to determine the rights, duties and liabilities of the directors.

No claim is made in the complaint that the Company is insolvent by reason of this purchase; that the directors committed fraud; that the stock was worth less than the purchase price; or that it injuriously affected the company or its capital or was made for the personal gain of directors in derogation of the interests of the company. The bare assertion that the stock purchase was a speculation and that it was therefore a breach of trust is a conclusion of law and not an allegation of fact, (Brady v. Collom, 65 A.2d 450) and is not admitted by motion for judgment on the pleadings. Since the purchase of Pfizer stock of which Jamieson complains was authorized by statute, we can find no breach of trust or duty arising from the facts alleged in the complaint.

After careful consideration, we find plaintiff's other contentions to be without sufficient merit to warrant discussion. The decree of the Superior Court is affirmed.

DECREE AFFIRMED.

MURPHY, P.J. and ENGLISH, J. Concur.

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